159 U.S. 698

159-698

RECORD, CASE No. 14,917.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1443~~. 773 669 338 65

THE LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, APPELLANT,

vs.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY AND THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED OCTOBER 28, 1891.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 23, 1891.

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1 Appeal.

United States Circuit Court, Western District of Tennessee.

LITTLE ROCK & MEMPHIS RAILROAD CO. *vs.* EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD CO. and ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD CO.	422.	In Equity.

Interstate commerce—Railroads—Discrimination between connecting lines—Ownership of the competing line.

U. M. & G. B. Rose, W. G. Weatherford, for plaintiff; Morgan & McFarland, Poston & Poston, Wm. M. Baxter, for defendants.

2 *Original Bill. Filed Apr. 13th, 1889.*

Circuit Court of the United States, Western District of Tennessee.

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY *vs.* THE EAST TENNESSEE, VIRGINIA AND GEORGIA Railroad Company and The St. Louis, Iron Mountain and Southern Railroad Company.	No. 422.	Equity.

To the honorable judges of said court, in chancery sitting:

Your orator, The Little Rock and Memphis Railroad Company, states that it is engaged in operating the railroad between the cities *in* Memphis, in the State of Tennessee, and Little Rock, in the State of Arkansas, formerly known as the Memphis and Little Rock railroad. Its traffic has consisted principally in the transportation of through passengers and freight from points east of the Mississippi river bound to western and southern points in the State of Texas and elsewhere and in the reverse direction.

3 The St. Louis, Iron Mountain and Southern Railway Company operates a railroad from the city of St. Louis, in the State of Missouri, passing through the city of Little Rock, to the town of Texarkana, on the boundary between the States of Arkansas and Texas, where it makes connection with extensive systems of railroads in Texas. The East Tennessee, Virginia and Georgia Railroad Company is engaged in operating a number of railroads in the States for which it is named, with its western terminus in the city of Memphis, which it reaches over the Memphis and Charleston railroad, owned and operated by it. The last-named system is one of the largest feeders of the road operated by your orator, contributing during the half year ending June 30th, 1888, 3,387 passengers, of whom 1,591 or nearly half came upon through tickets over the Little Rock and Memphis road and the St.

4 Louis, Iron Mountain and Southern railway, with a traffic substantially equal in the opposite direction. The said St.

Louis, Iron Mountain and Southern railway is by far the most important connection of your orator, the exchange of passengers with it during the six months ending June 30th, 1888, amounting to 11,139. In May, 1888, the St. Louis, Iron Mountain and Southern railway opened a branch from Bald Knob, in the State of Arkansas, to Memphis, in the State of Tennessee, running parallel with your orator's line, and built for the express purpose of competing with it. It is fifteen miles longer than your orator's line, and its facilities for accommodating the through passenger traffic at Memphis are much inferior to those of your orator's. To reach its depot in Memphis from that of the East Tennessee, Virginia and Georgia railroad a transfer of about two miles in an omnibus over
5 rough streets is necessary, while to your orator's track passengers can be transferred in the cars in which they arrive.

For these reasons, notwithstanding the opening of the Bald Knob branch, the traffic of your orator remained substantially the same, the travelling public preffer-ing it to its adversary. For the purpose of breaking down the legitimately acquired business of your orator and crushing a rival the St. Louis, Iron Mountain and Southern Railway Company has directed all railroads connecting at Memphis to call in all through tickets reading over the Little Rock and Memphis railroad and thence over the St. Louis, Iron Mountain and Southern railway, leaving on sale only the through tickets ove- the Bald Knob branch; and the East Tennessee, Virginia, and Georgia Railroad Company has signified its assent to this direction, and has, since July 1st, 1888, actually withdrawn the tickets over
6 your orator's line in connection with the St. Louis, Iron Mountain and Southern railway, but still continues to sell tickets over the Bald Knob branch and the St. Louis, Iron Mountain and Southern railway; all of which is in direct contravention of the provisions of the act of Congress entitled "An act to regulate commerce," approved February 4th, 1887. Your orator therefore prays for process of subpœna against the said defendants named in the caption and for a mandatory injunction against said defendants requiring them to afford your orator the same equal facilities as are afforded to any other connecting road, and for such other relief as may be deemed equitable.

W. G. WEATHERFORD,
U. M. AND G. B. ROSE,
For Complainants.

I say that I am the president of the Little Rock and
7 Memphis Railroad Company, and that the statements contained in the foregoing are true to the best of my knowledge and belief.

RUDOLPH FINK.

Subscribed and sworn to before me this 10th day of April, 1889.

F. E. HASTINGS,
[SEAL.] *Notary Public.*

8 Know all men by these presents that we, The Little Rock & Memphis Railroad Company and W. G. Weatherford, — held and firmly bound unto said defendants, The East Tenn., Va. & Ga. R. R. Co. and The St. Louis, I. M. & So. R'y Co., in the sum of two hundred and fifty dollars, but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendant-, and also on failure of the said plaintiff to prosecute the said suit with effect, and also on failure of the defendant-, if convicted, to pay said costs.

Witness our hands and seals this 13th day of April, A. D. 1889.

LITTLE ROCK & MEMPHIS R. R. CO., [L. S.]
By WEATHERFORD, *Att'y.* [L. S.]
W. G. WEATHERFORD. [L. S.]

Approved by and acknowledged before me the 13th day of April, A. D. 1889.

J. B. CLOUGH, *Clerk.*
—— ——, *D. C.*

[Endorsed:] No. 422. U. S. circuit court, western district Tennessee, western division. Little Rock and Memphis Railroad Company *vs.* East Tenn., Virginia and — Railroad Co. *et al.* Cost bond. Filed at Memphis on the 13th day of April, A. D. 1889. J. B. Clough, clerk. —— ——, D. C.

9 The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summons the East Tennessee, Virginia & Georgia Railroad Company, if to be found within your district, to appear before the circuit court of the United States, in the sixth circuit, for the western district of Tennessee, at Memphis, in said district, on the first Monday in May next, and then and there to plead, answer, or demur to the bill filed in the office of the clerk of the said court on the 13th day of April, 1889, against said defendant and another by the Little Rock & Memphis Railroad Company.

Herein fail not, and have you then and there this writ.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 13th day of April, A. D. 1889, and the 113th year of American Independence.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

J. B. CLOUGH, *Clerk.*
—— ——, *D. C.*

Memorandum.

The defendant above named is required to enter its appearance in this suit in the office of the clerk of the circuit court, at Memphis,

on or before the day on which the subpœna is returnable, or the allegations of the bill will be taken for confessed against said defendant and judgment rendered accordingly.

J. B. CLOUGH, *Clerk.*

10 [Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. Little Rock & Memphis R. R. Co. *vs.* East Tenn., Va. & Ga. R. R. Co. *et al.* Summons. Issued 13 day of April, 1889. J. B. Clough, clerk. Returnable to May rule day, A. D. 1889. Ret'd and filed 17 day of April, A. D. 1889. J. B. Clough, clerk. Weatherford — Rose, attorneys.

Marshal's Return.

Executed by summoning R. B. Pegram, sup't of the East Tenn., Va. & Ga. R. R. Co., and also leaving copy of summons and declaration (or bill) with said Pegram, as within commanded, he being the highest officer of the East Tenn., Va. & Ga. R. R. Co. to be found in my district.

This April 16, 1889.

T. B. YANCEY,
U. S. Marshal,
By L. W. SMITH, *Dept.*

11 The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summons the St. Louis, Iron Mountain and Southern Railway Company, if to be found within your district, to appear before the circuit court of the United States, in the sixth circuit, for the western district of Tennessee, at Memphis, in said district, on the first Monday in May next, and then and there to plead, answer, or demur to the bill filed in the office of the clerk of the said court on the 13th day of April, 1889, against said defendant and another by the Little Rock and Memphis Railroad Company.

Herein fail not, and have you then and there this writ.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 13th day of April, A. D. 1889, and the 113th year of American Independence.

[L. S.] JOHN B. CLOUGH, *Clerk.*
—— ——, *D. C.*

Memorandum.

The defendant above named is required to enter its appearance in this suit in the office of the clerk of the circuit court, at Memphis, on or before the day on which the subpœna is returnable, or the allegations of the bill will be taken for confessed against said defendant and judgment rendered accordingly.

JOHN B. CLOUGH, *Clerk.*

12 [Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. Little Rock & Memphis R. R. Co. *vs.* St. L., I. M. & So. R'y Co. *et al.* Summons. Issued 13th day of April, 1889. J. B. Clough, clerk. ——— ———, deputy. Returnable to May rule day, A. D. 1889. Ret'd and filed 17th day of Apr., A. D. 1889. J. B. Clough, clerk. ——— ———, D. C. ——— ———, attorney.

Executed by summoning F. W. Brown, agent of the St. L., I. M. & So. R'y Co., and also leaving copy of summons and declaration (or bill) with said Brown, as within commanded, he being the highest officer of the St. L., I. M. and So. R'y Co. to be found in my district.

This April 15, 1889.

T. B. YANCEY,
U. S. Marshal,
By L. W. SMITH, *Deputy.*

13 *Plea in Abatement. Filed May 11th, 1889.*

Circuit Court of the United States, Western District of Tennessee, at Memphis, Tennessee.

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY
vs.
EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY. } No. 422. Equity.

And now comes the defendant, The East Tennessee, Virginia and Georgia Railroad Company, in its own proper person and enters its appearance for the purpose of filing this plea, but for none other, and for plea says that this court has no jurisdiction to pronounce judgment against it in this suit, because it says that the process in this case was not served either upon the president or other head, nor upon its cashier or treasurer or secretary, nor upon any director, nor upon its chief agent, residing in the county of Shelby, Tenn., and that the said R. B. Pegram, upon whom process was served, was not at the time of the service of said process either its presi-

14 dent or other head nor its cashier, treasurer, secretary, director, or chief agent, and this defendant prays may be inquired of by the country.

Wherefore it prays the judgment of the court, and that this suit may be abated.

EAST TENNESSEE, VIRGINIA AND
GEORGIA RAILROAD COMPANY,
By WM. M. BAXTER, *Attorney.*

POSTON & POSTON, *Of Counsel.*

STATE OF TENNESSEE, *County of Knox,* } *ss:*

C. H. Hudson, agent for said East Tennessee, Virginia and Georgia

Railroad Company, defendant in the above-entitled case, makes oath that he has read the foregoing plea and knows the contents thereof, and that the same is true in substance and in fact.

C. H. HUDSON, *Agent.*

Sworn to and subscribed before me this 10th day of May, 1889.

DAN'L KELLY,
Notary Public.

[SEAL.]

15 *Demurrer to Plea in Abatement. Filed May 16th, 1889.*

Circuit Court of the United States, Western District of Tennessee.

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY
vs.
EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.
} No. 422. Equity.

The complainant demurs to the plea in abatement of the defendant, The East Tennessee, Virginia and Georgia Railroad Company, and for cause assigns:

1st. Said plea does not negative the fact that said defendant company has "an office or agency or resident director" in the county in which the process was issued and served, and in that case it was competent to serve the same on "any agent or clerk employed therein."

2d. The marshal having officially returned the process executed, it is incumbent on defendant, by its plea in abatement, to negative every method known to the law by which legal service might have been had, which the plea fails to do.

3d. Said plea does not set out the names and residence of
16 the president and other officers of said company, nor does it state who is the chief agent residing in this county or district.

W. G. WEATHERFORD,
For Complainant.

17 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1888, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 23d day of May, A. D. 1889, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, Plaintiff,
vs.
EAST TENN., VA. & GEORGIA R. R. Co. and ST. LOUIS, IRON M'T'N & SO. R. R. Co., Defendant-. } No. 422. Equity.

For satisfactory reasons to the court appearing it is hereby ordered by the court that this case be, and it is hereby, continued to the next term of this court.

[Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. L. R. & M. R. R. Co. *vs.* E. Tenn., Va. & Ga. R. R. Co. Order of court. Entered and filed 23 day of May, A. D. 1889. John B. Clough, clerk.

18 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1888, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 25th day of May, A. D. 1889, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, Plaintiff,
vs.
EAST TENN., VA. & GEORGIA R. R. Co. and ST. LOUIS, IRON M'T'N & SO. R. R. Co., Defendant-. } No. 422. Equity.

This cause this day came on to be heard on the plaintiff's demurrer filed herein on May 16th, 1889, to the plea in abatement filed herein on May 11th, 1889, and upon argument thereof it is hereby considered and ordered by the court that the said demurrer be, and it is hereby, sustained, with leave to said defendant- to amend *its* said plea in abatement or to file a new plea in abatement.

[Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. Little Rock, etc., R. R. Co. *vs.* E. T., Va. & Ga. R. R. Co. *et al.* Order of court. Entered and filed 25 day of May, A. D. 1889. John B. Clough, clerk.

19 *Amended Plea in Abatement. Filed May* 31, 1889.

Circuit Court of the United States, Western District of Tennessee.

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY
vs.
EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY. } No. 422. Equity.

Amended plea of defendant filed by leave of court first had and obtained.

And now comes the East Tennessee, Virginia and Georgia Railroad Company in its own proper person and enters its appearance herein for the purpose of filing this plea, but for none other, and for plea says that this court has no jurisdiction to pronounce judgment against it in this suit because it says that the process in this cause was not served either upon the president or other head nor upon its cashier or treasurer or secretary nor upon any director nor upon its chief agent or any other agent of it residing in the county of Shelby, Tennessee, and that the said R. B. Pegran, upon whom service of process was had, at the time of the service of said
20 process was neither its president or other head nor its cashier, treasurer, secretary, director, or chief agent or any agent or clerk in its employ or had anything to do with its business, and this defendant prays may be inquired of by the country.

Wherefore it prays the judgment of the court and that this suit may be abated.

EAST TENNESSEE, VIRGINIA AND
GEORGIA RAILROAD COMPANY.
By W. A. HENDERSON, *Attorney.*

POSTON & POSTON, *Of Counsel.*

STATE OF TENNESSEE, }
County of Knox. }

C. H. Hudson, agent for said East Tennessee, Virginia and Georgia Railroad Company, defendant in the above-entitled cause, makes oath that he has read the foregoing plea and knows the contents thereof, and that the same is true in substance and in fact.

C. H. HUDSON, *Agent.*

Subscribed and sworn to before me this 29th day of May, 1889.

DAN'L KELLY,
[SEAL.] *Notary Public, Knox County.*

21 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1889, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 1st day of June, A. D. 1889, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, Plaintiff,
vs.
EAST TENN., VA. & GEORGIA R. R. Co. and ST. LOUIS, IRON M'T'N & SO. R. R. Co., Defendant-. } No. 422. Equity.

Came again the plaintiff and the defendant The East Tennessee, Virginia and Georgia Railroad Company, by their attorneys, when this cause was called for hearing on said defendant's plea in abatement filed herein on May 31st, 1889, when the plaintiff, confessing the same, moves the court for an alias summons or subpœna herein against said defendant to be issued for service in this district, and for a counterpart of the same to be issued for service in the eastern district of Tennessee; which motion is hereby granted by the
22 court, and the clerk is ordered to issue the said writs with copies thereof and of the bill herein for service, returnable to the first Monday in July.

23 The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summons The East Tennessee, Virginia and Georgia Railroad Company, citizen of the State of Tennessee, if to be found within your district, to appear before the circuit court of the United States, in the sixth circuit for the western district of Tennessee, at Memphis, in said district, on the first Monday in July next, and then and there to plead, answer, or demur to the bill filed in the office of the clerk of the said court on the 18th day of April, 1889, against said defendant by The Little Rock and Memphis Railroad Company. Herein fail not, and have you then and there this writ.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this first day of June, A. D. 1889, and the 113th year of American Independence.

[L. S.] J. B. CLOUGH, *Clerk.*

Memorandum.

The defendant aforesaid is required to enter its appearance in this suit in the office of the clerk of the circuit court, at Memphis, on or before the day on which the subpœna is returnable or the al-

legations of the bill will be taken for confessed against said defendant and judgment rendered accordingly.

J. B. CLOUGH, *Clerk.*

24 [Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. Little Rock & M. R. R. Co. *vs.* East Tenn., Va. & Ga. R. R. Co. Summons. Issued 15th day of June, 1889. J. B. Clough, clerk. Returnable to July rule day, A. D. 1889. Ret'd and filed 20th day of Sept., A. D. 1889. J. B. Clough, clerk. Rose — Weatherford, attorneys.

At Memphis, Tenn., I executed the within summons on Charles A. Dessessaner by reading and making known the contents and delivering copy of summons on bill to Charles A. Dessanser, ass't general passenger agent, this June 3d, 1889.

J. W. BROWN,
U. S. Marshal,
By E. D. COLLIER, *Deputy.*

25 The President of the United States of America to the marshal of the eastern district of Tennessee, Greeting:

You are hereby commanded to summons The East Tennessee, Virginia and Georgia Railroad Company, citizen of the State of Tennessee, if to be found within your district, to appear before the circuit court of the United States, in the sixth circuit for the western district of Tennessee, at Memphis, in said district, on the first Monday in July next, and then and there to plead, answer, or demur to the bill filed in the office of the clerk of the said court on the 18th day of April, 1889, against said defendant by the Little Rock and Memphis Railroad Company. Herein fail not, and have you then and there this writ.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this first day of June, A. D. 1889, and the 113th year of American Independence.

[L. S.] J. B. CLOUGH, *Clerk.*

Memorandum.

The defendant aforesaid is required to enter its appearance in this suit in the office of the clerk of the circuit court, at Memphis, on or before the day on which the subpœna is returnable or the allegations of the bill will be taken for confessed against said defendant and judgment rendered accordingly.

J. B. CLOUGH, *Clerk.*

26 [Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. Little Rock and Memphis R. R. Co. *vs.* East Tenn., Va. & Ga. R. R. Co. Counterpart summons. Issued 1 day of June, 1889. J. B. Clough, clerk. Returnable to July rule day A. D. 1889. Ret'd and filed 13th day of June, A. D. 1889. J. B. Clough, clerk. Rose — Weatherford, attorneys.

Came to hand June 6th, 1889, and executed as commanded June 10th, 1889, by leaving a copy of the within summons with C. H. Hudson, agent of the plaintiff, The East Tennessee, Virginia & Georgia Railroad Co., this June 10, 1889, gen'l agent at Knoxville.

J. H. PEOPLES,
Chief Deputy U. S. Marshal.

27 *Joint and Several Demurrers of the Defendants. Filed July 17th, 1889.*

Circuit Court of the United States, Western District of Tennessee.

THE LITTLE ROCK AND MEMPHIS RAILROAD COMPANY
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN Railroad Company and The East Tennessee, Virginia and Georgia Railroad Company.
No. 422. Equity.

Joint and several demurrers of the defendants.

Come defendants, by their solicitors, and, without confessing, &c., demur to said original bill herein, and for cause of demurrer say:

First. Said bill is without equity on its face.

Second. Said bill, purporting to be filed under the provisions of the act approved February 4th, 1887, entitled "An act to regulate commerce," fails to show any complaint cognizable thereunder, as the failure to do the acts complained of *if* not violative of any of its provisions and is the cause for no redress either at law or in equity.

28 Ky. & Ind. Bridge Company *vs.* L. & N. R. R; Jackson, J.; opinion delivered February 27th, 1889; Interstate Commerce Reports, vol. 2, page- 313–392.

Report Interstate Commerce Commissioners, Little Rock and Memphis Railroad Company *vs.* East Tennessee, Virginia and Georgia Railroad Company, March 25th, 1889.

L. & M. R. R. Co. *vs.* E. T., Va. & Ga. R. R. Co., 41 Federal R., 559.

Third. The matters complained of are not the subject of legislative or judicial control or enforcement, but can only be reached by mutual contract and agreement, and the bill, so far as it seeks judicial aid in this respect, is without equity and must be dismissed.

Same authorities as above.

Atchison, T. & S. F. R. R. Co. *vs.* Denver and New Orleans R. R. Co., 110 U. S., 682.

Fourth. Said bill relying entirely upon supposed grievances arising under said "act to regulate commerce," approved February 4th,

1887, which do not exist, this court is without jurisdiction to
29 proceed upon any other grounds for want of proper citizenship averred in the pleadings.

MORGAN AND MCFARLAND,
For St. Louis & I. M. R'y Co.
POSTON & POSTON,
Sol's for E. T., Va. & Ga. Railroad Co.

We, the undersigned, attorneys for the above demurrants, certify that in our opinion the grounds of demurrer relied upon are well taken.

MORGAN & MCFARLAND, *Attorneys.*
POSTON & POSTON, *Attorneys.*

30 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1889, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 23d day of October, A. D. 1889, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, Plaintiff,
vs.
EAST TENN., VA. & GEORGIA R. R. Co. and ST. LOUIS, IRON M'T'N & SO. R. R. Co., Defendant-. } No. 422. Equity.

For satisfactory reasons to the court appearing it is hereby ordered by the court that this case be, and it is hereby, continued to the next term of this court.

[Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. L. R. & M. R. R. Co. *vs.* E. T., Va. & Ga. R. R. Co. *et al.* Order of court. Entered and filed 23 day of Oct'r, A. D. 1889. John B. Clough, clerk.

31 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1889, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 19th day of November, A. D. 1889, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, Plaintiff,
vs.
EAST TENN., VA. & GEORGIA R. R. Co. and ST. LOUIS, IRON M'T'N & So. R. R. Co., Defendant-. } No. 422. Equity.

For satisfactory reasons to the court appearing it is hereby ordered by the court that this case be, and it is hereby, continued to the next term of this court.

[Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. L. R. & M. R. R. Co. *vs.* E. T., Va. & Ga. R. R. Co. *et al.* Order of court. Entered and filed 19 day of Nov., A. D. 1889. John B. Clough, clerk.

32 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1889, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 21st day of March, A. D. 1890, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, Plaintiff,
vs.
EAST TENN., VA. & GEORGIA R. R. Co. and ST. LOUIS, IRON M'T'N AND So. R. R. Co., Defendant-. } No. 422.

For satisfactory reasons to the court appearing it is hereby ordered by the court that this case be, and it is hereby, continued to the next term of this court, with leave, however, to either party to move for an order to set aside this order of continuance.

[Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. L. R. & M. R. R. Co. *vs.* E. T., Va. & Ga. R. R. Co. *et al.* Order of court. Entered and filed 21 day of M'ch, A. D. 1890. John B. Clough, clerk.

33 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1890, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 22d day of August, A. D. 1890, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, Plaintiff,
vs.
EAST TENN., VA. & GEORGIA R. R. Co. and ST. LOUIS, IRON M'T'N & SO. R. R. Co., Defendant-. } No. 422. Equity.

For satisfactory reasons to the court appearing it is hereby ordered by the court that this cause be, and the same is hereby, continued to the next term of this court, but leave is hereby given to either party to move for the setting aside of this order of continuance.

[Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. L. R. & M. R. R. Co. *vs.* E. T., Va. & Ga. R. R. Co. *et al.* Order of court. Entered and filed 22 day of Aug., A. D. 1890. John B. Clough, clerk.

34 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1890, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 22d day of November, A. D. 1890, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, Plaintiff,
vs.
EAST TENN., VA. & GEORGIA R. R. Co. and ST. LOUIS, IRON M'T'N & SO. R. R. Co., Defendant-. } No. 422. Equity.

For satisfactory reasons to the court appearing it is hereby ordered by the court that this cause be, and it is hereby, continued to the next term of this court.

[Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. L. R. & M. R. R. Co. *vs.* E. T., Va. & Ga. R. R. Co. *et al.* Order of court. Entered and filed 22 day of Nov., A. D. 1890. John B. Clough, clerk.

35 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1890, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 23d day of May, A. D. 1891, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY, Plaintiff,
vs.
EAST TENN., VA. & GEORGIA R. R. Co. and ST. LOUIS, IRON M'T'N & SO. R. R. Co., Defendant-. } No. 422. Equity.

For satisfactory reasons to the court appearing it is hereby ordered by the court that this case be, and it is hereby, continued to the next term of this court.

[Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. L. R. & M. R. R. Co. *vs.* E. T., Va. & Ga. R. R. Co. *et al.* Order of court. Entered and filed 23 day of May, A. D. 1891. John B. Clough, clerk.

36 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1891, at the United States court-house, in the city of Memphis, in said district, on, to wit, the first day of October, A. D. 1891, in the following cause, to wit:

LITTLE ROCK AND MEMPHIS RAILROAD CO., Plaintiff,
vs.
EAST TENN., VIRGINIA AND GEORGIA R. R. Co. and ST. LOUIS, Iron Mountain and Southern R'y Co., Defendant-. } No. 422.

This cause having heretofore been submitted to the court, and the court being now well and sufficiently advised in the premises, it is considered that the bill herein be dismissed for want of equity and the defendants have and recover of the said complainant all their costs herein expended and have execution therefor. Thereupon the said complainant in open court files its petition praying an appeal
37 to the Supreme Court of the United States from the decision herein, and also its assignment of errors; and said appeal is allowed.

38 *Prayer for Appeal. Filed Oct.* 1, 1891.

Circuit Court of the United States, Western District of Tennessee.

LITTLE ROCK AND MEMPHIS R. R. Co.
vs.
EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD Co. and St. Louis, Iron Mountain and Southern R. R. Co. } No. 422.

The said complainant prays an appeal to the Supreme Court of the United States from the decree rendered in this cause.

U. M. AND G. B. ROSE.

39 *Appeal Bond. Filed Oct. 8th*, 1891.

Circuit Court of the United States, Western District of Tennessee.

LITTLE ROCK AND MEMPHIS RAILROAD CO.
versus
EAST TENN., VA. & GA. RAILROAD CO. and ST. LOUIS, IRON MOUNTAIN AND SO. RAILROAD CO. } No. 422.

Know all men by these presents that we, the Little Rock and Memphis Railroad Company, as principal, and Rudolph Fink, as surety, are held and firmly bound unto the East Tennessee, Virginia and Georgia Railroad Company and the St. Louis, Iron Mountain and Southern Railroad Company in the sum of one thousand dollars, to be paid to the said last-named railroad companies; to which payment, well and truly to be made, we and each of us bind ourselves, jointly and severally, and our and each of our heirs, successors, exectors, and administrators, firmly by these presents.

Sealed with our seals. Signed and dated this sixth day of October, A. D. 1891.

Whereas the above-named Little Rock and Memphis Rail-
40 road Company has prosecuted an appeal to the Supreme Court of the United States to revise the decree and judgment rendered in the above-entitled cause by the circuit court of the United States within and for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Little Rock and Memphis Railroad Company shall prosecute said appeal to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise remain in full force and virtue.

LITTLE ROCK & MEMPHIS R'D CO.. [SEAL.]
By U. M. & G. B. ROSE.
RUDOLPH FINK. [SEAL.]

I, Ralph L. Goodrich, clerk of the U. S. circuit court, west. division of the eastern district of Arkansas, do hereby certify that the surety on the foregoing bond is sufficient for the amount therein stated.
Oct. 6, 1891.

[L. S.] RALPH L. GOODRICH,
Clerk U. S. Cir. C't, W. D. of East. Dist. Ark's.

This bond is hereby approved.
October 8, 1891.

E. S. HAMMOND, *Judge, &c.*

41 *Assignment of Errors. Filed Oct.* 1, 1891.

Circuit Court of the United States, Western District of Tennessee.

LITTLE ROCK AND MEMPHIS R. R. Co.
v.
EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD Co. and St. Louis, Iron Mountain and Southern R. R. Co. } No. 422.

The complainant hereby assigns the following errors in the decree herein:

1. The court erred in holding that the refusal of the defendant The East Tennessee, Virginia and Georgia R'd Co. to sell through tickets to points beyond Little Rock over the line of the railroad of the complainant while selling such tickets to such points over the parallel and competing line of the St. Louis, Iron Mountain and Southern R'y Co. was not a violation of the 3d section of the act of Congress of the United States entitled "An act to regulate interstate commerce," approved February 4th, 1887.

42 2. The court erred in refusing to enjoin the East Tennessee, Virginia and Georgia R'd Co. from selling such through tickets over the line of the St. Louis, Iron Mountain and Southern R'y Co. while refusing to sell the same over the line of the complainant.

3. The court erred in refusing to enjoin the defendant The St. Louis, Iron Mountain and Southern R'y Co. from refusing to transport passengers carried upon through tickets as aforesaid over the complainant's line while transporting them upon such through tickets over its own line.

U. U. AND G. B. ROSE.

43 United States Circuit Court, Western District of Tennessee.

LITTLE ROCK & MEMPHIS RAILROAD Co.
vs.
EAST TENNESSEE, VIRGINIA & GEORGIA Railroad Co. and St. Louis, Iron Mountain & Southern Railroad Co. } In Equity. Opinion. Filed Sept. 16th, 1891.

Interstate Commerce—Railroads—Discrimination between connecting lines—Ownership of the competing lines.

The Iron Mountain Railroad from St. Louis, Mo., to Texarkana, Ark., and with its connections reaching into Louisiana and Texas and across the continent, has a branch from its main line at Bald Knob, Ark., to Memphis, Tenn. The Little Rock & Memphis railroad runs from Little Rock, Ark., where it has a physical connection with the Iron Mountain road to Memphis, Tenn., on a line fifteen miles shorter than the other. At Memphis both roads have equal facilities for connections with and transfers to roads running

eastwardly or elsewhere into the States east of the Mississippi river, if the Little Rock & Memphis facilities be not superior, as the bill alleges. The East Tennessee, Virginia & Georgia railroad, with its leased line of the Memphis & Charleston railroad runs east of the Mississippi into several States and to the seaboard. Formerly and before the building of the Bald Knob branch of the Iron Mountain road the Little Rock & Memphis road had traffic arrangements with the Iron Mountain and East Tennessee, Virginia & Georgia roads for through ticketing of passengers both ways. Since the build-
44 ing of its Bald Knob branch the Iron Mountain road refuses to recognize through tickets over the Little Rock & Memphis road to or from points in the Iron Mountain system beyond Little Rock, and the East Tennessee, Virginia & Georgia road declines to keep such tickets on sale or to offer its passengers a choice of routes because the Iron Mountain will not take the tickets, but it does issue on equal terms through tickets over either route to Little Rock itself.

Held: That as between the Iron Mountain and Little Rock & Memphis roads this was not a discrimination between connecting lines prohibited by the interstate commerce act, but only a legitimate offer of the superior facilities of a through line over a local line in competition for the through travel, and that the ownership of a rival line authorized such preference of one's own road; that as between the Little Rock & Memphis and the East Tennessee, Virginia & Georgia roads there was not any unjust, undue, or unlawful discrimination, because the facilities offered by the Iron Mountain of a longer and through track to points not reached by the other road were superior to those offered by the local and shorter road, and until the Iron Mountain would make through rates with it that would afford equal facilities in this respect there could be no through tickets sold usefully by the East Tennessee, Virginia & Georgia road, and hence there was no unlawful discrimination in the transaction.

U. M. & G. B. Rose, W. G. Weatherford, for plaintiff; Morgan & McFarland, Poston & Poston, Wm. M. Baxter, for defendants.

HAMMOND, *J.*:

The Little Rock & Memphis Railroad extends from Memphis, Tenn., to Little Rock, Ark., where it has a physical connection with the St. Louis, Iron Mountain & Southern railroad, extending from St. Louis, Mo., by way of Little Rock, to Texarkana, at the junction of the boundaries of the States of Texas, Arkansas, and Louisiana, where it connects with other railroads running into
45 Texas and across the continent. The East Tennessee, Virginia & Georgia railroad, with its leased line of the Memphis & Charleston railroad, extends eastwardly from Memphis to the eastern boundary of the State of Tennessee, and with its connections runs into many States and to the seaboard. The Iron Mountain road has a branch of its road running from Bald Knob, Ark., to Memphis. At Memphis the eastern and western connections are

made by rail through the streets of the city and by railroad transfer ferries across the Mississippi river; but it is alleged in the bill that as to passengers the connection with the Iron Mountain road must be made by ordinary vehicles through the streets, transferring them from one railway car to another from the stations of each road, while the connection with the Little Rock road may be made by rail through the city and across the river; wherefore the bill alleges the traveling public prefers the Little Rock & Memphis road, and would largely patronize it but for the alleged discriminations against it, which it is the purpose of the bill to remove.

These discriminations consist, as appears from the averments of the bill, of a traffic arrangement made between the Iron Mountain road and the East Tennessee, Virginia & Georgia system, whereby through ticketing of passengers is made to points beyond Little Rock over the Bald Knob branch of the Iron Mountain road, which is refused to Little Rock road, and coming this way the Iron Mountain refuses to sell through tickets over the Little Rock road to Memphis or beyond. This arrangement is carried out by the East Tennessee, Virginia & Georgia declining to sell through tickets over the Little Rock and the Iron Mountain refusing to recognize such tickets on its road; and the bill states specifically the facts and figures which show how hardly this discrimination bears upon the Little Rock road and deprives it of travel which, before the Bald Knob branch was built, it enjoyed as a monopoly and would yet enjoy, the bill states, if the choice of the traveling public was allowed to operate in favor of its better facilities and shorter route. The bill avers that this discrimination is in violation of the interstate commerce act of Congress, and prays for a mandatory injunction and other process to compel the defendant roads to sell and recognize through tickets over the plaintiff road, and for general relief.

It may be observed here that the bill does not complain of
46 any discrimination to Little Rock or points on the plaintiff road between Little Rock and Memphis, and it is stated in the argument that the East Tennessee, Virginia & Georgia system still sells tickets over the plaintiff road to Little Rock, if desired, as well as over the Iron Mountain; but the trouble arises over points beyond Little Rock west and beyond Memphis east.

To this bill there has been a demurrer filed because, first, there is no equity in it; second, there is no complaint cognizable under the interstate commerce act, and no conduct is averred violating it; third, the matter complained of is not subject to legislative or judicial control and can be reached only by mutual agreement; and, fourth, not coming within the interstate commerce act, the court has no jurisdiction, a diversity of citizenship not being averred.

The bill is based upon the plaintiff's construction of the third section of the interstate commerce act, which reads as follows:

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality or any particular description of traffic in any respect whatsoever, or to subject any particular person, com-

pany, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The questions made about the jurisdiction may be easily disposed of, so far as they relate to the authority of the court to adjudicate the issues tendered by the bill. The subject-matter of the suit is one arising under an act of Congress, and the court has jurisdiction without regard to any diversity of citizenship of the parties.

47 Kentucky & Indiana Bridge Co. *vs.* Louisville & Nashville R. R. Co., 37 Fed. Rep., 567, 615.

The argument for the demurrer proceeds, however, upon the theory that the jurisdiction of the court here is limited by the provisions of the interstate commerce act, prescribing certain remedies which may be taken in this court for its enforcement. It is hardly necessary to decide that question, but if it be there can be but little doubt that the plenary jurisdiction of this court to entertain all controversies arising under an act of Congress, either at law or equity, has not been abbreviated by this act in relation to controversies arising under it, but the special remedies, so far as they are special, are merely supplementary to the ordinary remedies existing under the subsisting judiciary act which governs all our jurisdiction. This is fairly inferrible, if not directly decided from the decision of Mr. Circuit Judge Jackson, just cited; and in my judgment there can be no doubt of this, whether it has been so decided or not. Whatever jurisdiction a court of equity may entertain of this controversy may be entertained here; if not under the regulations of the interstate commerce act prescribing certain remedies, then under the judiciary act giving us the powers of an equity court as to all cases and controversies arising under any act of Congress.

But when we come to consider that branch of the demurrer which denies the equity of this bill, as in all other demurrers of like kind, it presents for judgment the question whether the bill states an equitable right and asks an equitable remedy, taking the facts averred to be true as stated. It is not so much a question of jurisdiction, often, as it is a question of the sufficiency or merits of the bill, and, that being the case here, we proceed to consider it in that view.

If this bill averred that the East Tennessee, Virginia & Georgia railroad refused to give passengers going over the plaintiff's road the same rates and facilities, including through tickets and traffic

transfers, that it affords to the Iron Mountain road for passengers going to Little Rock or any other point on the plaintiff's road, the court would not hesitate to say that it would be a violation of this section of the interstate commerce act. Whether such violation could be remedied by a court of equity and by a bill like this
48 or in a court of law, or could only be reached, as probably many violations only can, by resort to the remedies afforded for criminal prosecution by the act, would be another matter; but it does not follow because Congress has not gone far enough to construct the machinery to compel such connections and facilities in the one case as are given by contract in the other that it is not a violation of the interstate commerce act, or because a court of equity or a court of law cannot redress the violation as they are now authorized to proceed that there has been no violation at all; nor can this prohibition of undue or unreasonable discriminations be evaded by a contract any more than in any other way—if they be undue or unreasonable. It may be that whether the unlawful discrimination be made through the medium of a contract (whether for through routing, as it is called, or otherwise) or by a refusal of the same rates and same facilities which are given by contract or without a contract that there is at present no redress by resort either to the administrative board which we know as the Interstate Commerce Commission or to the ordinary or special remedies prescribed for the courts of law or equity; yet they might possibly be redressed by the criminal courts under the interstate commerce act, or without the criminal provisions of that act if the United States had any common-law jurisprudence of crime, which it has not, by prosecution as for a misdemeanor; but this bill does not allege any such violation of the act as that suggested, and it seems to be conceded that the East Tennessee, Virginia & Georgia road does sell through tickets and affords the same facilities over the plaintiff's road as over the Iron Mountain to Little Rock, the trouble being not there, but in the refusing to sell through tickets and afford the same facilities to points beyond Little Rock and not on the plaintiff road, but on the road of the East Tennessee, Virginia & Georgia road's codefendant, The Iron Mountain Road.

Now, reversing the proposition just considered, and coming this way from the West, the court could have just as little hesitation in holding that it cannot be a violation of the interstate commerce act, and it may be even doubtful if Congress could make it so, since it might be taking property for the public use, so to speak, without compensation or depriving one of property without due process of law, for the Iron Mountain road to prefer to travel passengers
49 over its own road to Memphis to traveling them over the plaintiff's road, whether they come from Little Rock or beyond on the Iron Mountain road or some other and whether they be going only to Memphis or beyond to the eastward or elsewhere; and it cannot be either an undue or an unreasonable discrimination against the plaintiff to afford for passengers superior facilities, such as through tickets, shorter rates, or the like, over its own road in preference to that of its rival running a road part of

the way in the same direction. For illustration, if a passenger wishing to go from Texarkana or from some point in Texas to Memphis or beyond desires to travel over the Iron Mountain road, why should it not take him all the way to Memphis and deliver him to the East Tennessee, Virginia & Georgia or some other road wishing to take him, on easy terms as to rates, through tickets, and the like, rather than shunt him at Little Rock upon the plaintiff's road? It cannot be an unfair or an unreasonable discrimination against the plaintiff for the Iron Mountain to keep him on its own road by offering him superior facilities in the respects mentioned, however undue or unreasonable it might be in other roads to refuse the plaintiff the same facilities in transporting him that it affords the Iron Mountain; in other words, the Iron Mountain would not be violating the statutory prohibition in such a transaction, whatever may be said of other roads. It would be free of such imputation because it has a line of its own covering the same distance and may prefer itself to others as we all do in obedience to human nature. But even as to the East Tennessee, Virginia & Georgia road, why should it not take this passenger from the Iron Mountain at Memphis on through tickets, easy rates, and whatever terms may be agreed upon without an imputation of discriminating against the plaintiff? It could only do that by refusing to take the plaintiff's passengers brought to Memphis on the same terms as it took the other, and this refusal is not alleged. It is no fault of the East Tennessee road that the plaintiff cannot induce the Iron Mountain to bring passengers over its road from Texas to Little Rock and deliver them for transportation to the plaintiff from Little Rock to Memphis, and we have seen that the Iron Mountain may lawfully refuse this because it has a road of its own for that service.

Recurring to travel westward from points under the control of the East Tennessee, Virginia & Georgia road and we have precisely the same condition in principle, however it may seemingly be diverse. For one desiring to travel from Knoxville, Tenn., let us say, to Texarkana or beyond into Texas reaches the Iron Mountain at Memphis, and while he may have a choice of two roads there it is for only a part of the way, and he must at last take the Iron Mountain at Little Rock and go over that road beyond. It does not depend wholly upon equal or better facilities for transfer at Memphis, but also upon the capacity to transport the passenger to his destination beyond there.

Is it not plain that the Iron Mountain may offer him the same facilities to take its road at Memphis that it offered in the other case—may prefer its own road if it chooses? That it may force him to do that thing by refusing to enter into any arrangement with the plaintiff for a joint transportation of the passenger is equally clear. It is again the right of one to prefer one's self to another, and that cannot be an undue or unreasonable discrimination, however hardly it may bear upon that other, as long as the other is not molested in its business by a refusal to transport its passengers upon the same terms granted to the passengers of other roads. It would be unlawful if the Iron Mountain refused the same rates from Little Rock

onward that it offered to other roads feeding it at that point or to other passengers taking its track there, but it cannot be unlawful to prefer to feed itself from Memphis rather than have the plaintiff feed it. So the East Tennessee, Virginia & Georgia road, like the passenger we have in hand, may be compelled to route over the Iron Mountain road rather than over the Little Rock road by this exercise of its lawful right of preference of its own road by the Iron Mountain. The East Tennessee might violate the statute if the plaintiff's road ran parallel with the Iron Mountain all the way our passenger is going if it refused him a choice of routes on the same terms; but that is not this case, and the Iron Mountain has the advantage in reaching points not reached by the plaintiff and which can only be reached over its own road. The sum of it is that the whole merit of this bill must be tested solely by the right of the Iron Mountain to prefer its own road to that of the plaintiff; and, that right being lawfully exercised, there can be no wrong in other roads yielding a compulsory adjustment to it, and the plaintiff is without remedy unless Congress adopts the suggestion of the
51 Interstate Commerce Commission and interferes to make rates and routes through some agency appropriate to the process if Congress has the power in a case like this, which may be doubtful.

L. R. & M. R. R. Co. *vs.* E. Tenn., Va. & Ga. R. R. Co., 3 Interstate Com., 10.

In that case the Interstate Commerce Commission clearly declares that that which was complained of by this bill is in violation of the section of the act which has been quoted, and refused relief only because Congress has not authorized the commission, the courts, or any other governmental agency to correct the violation by adjusting the rates and facilities to the situation, and in the absence of such legislation, like that found in the English act to accomplish a similar purpose, the object can only be accomplished by agreement. It is alleged in the argument here that there is no power anywhere to coerce such an agreement until Congress enlarges the legislation. If this be so, then, indeed, a criminal prosecution would be the only remedy. But it is possible, if the court found the transactions complained of to be a violation of the act, that at least partial relief might be afforded through this bill by mandamus or injunction, or both; not to make a contract for the parties or rates of carriage, or the like, but by forbidding and enjoining the execution of any contract which is unlawful until it be made lawful by conformity to a regulation of commerce established by Congress under its authority. We do not quite agree that the courts would be powerless in such a case to redress the violation of an act of Congress. But we are relieved here of any decision of that question by our conclusion that it is not a violation of the interstate commerce act for a carrier to prefer its own road to that of its rival in a case like this, and for the reasons already stated. The Interstate Commerce Commission places its opinion upon the ground that while there is an apparent justice in the view we have taken it is subordinate to the public policy, manifested in the act, of facilitating the unrestricted flow of

commerce between the States and designed "to insure to the people every facility of equal choice which franchises granted in the public interest can by any combination of reasonable routes afford." This is true beyond question, but in exercising this, as every other
52 governmental power, legislation is limited in this country, if not in England, where parliamentary power is in a measure supreme, by private right oftentimes. No one is compelled to apply or to use his property for the public good without compensation. If the public take it to itself this is clearly so, and, while the compulsory surrender of the private right we are considering for a public benefit might not be a taking of property within the constitutional prohibition, it is so nearly akin to it in principle that even were the power to compel it existing the exercise of the power should not be implied except by necessity, and certainly, it seems to us, not from the language of this act so equivocal in its relation to the precise point of consideration presented by the facts of this case, however plain it may be in relation to other situations. Moreover, the prohibitions against impairing vested rights or depriving one of his property without due process of law, and the like, found in a variety of forms in our American constitutions, State and Federal, may impose some limitation upon such legislation or upon a construction of general language used in this legislation, to prevent the abrogation of this right, in the manner suggested by the Interstate Commerce Commission, and possibly this accounts for the absence of the clauses of the English legislation referred to as wanting in our act.

On the other hand, until an authoritative adjudication, we could not entirely agree that by any contract for through routing between carriers the prohibited discriminations of this act may be made, or that they would be held to be not prohibited because of any common-law right to make such contracts, or that it would be a proper test of the statutory prohibition as to the undue and unreasonable preference or advantage and reasonable, proper, and equal facilities to apply the common-law right of contracting for carriage beyond the carrier's own lines, thereby giving to a line composed of several independent carriers this benefit of the ownership of a continuous road which we concede to the Iron Mountain in this case, for the common-law right to contract as between independent carriers is not the same thing as a common and joint ownership by any means, and the one may be the subject of regulation by Congress, while the other may not, and it is not quite clear why a given carrier may afford a preference to a thing carried by one road over that carried or which might be carried by another, through the medium of a contract to carry jointly, when it
53 could not do that thing outside of such a contract, nor why the fact of such a contract would make a given discrimination, otherwise unlawful, a lawful one under this act; but in this case we have endeavored to show that the discrimination here does not arise at all out of the contract for through routing between the Iron Mountain and East Tennessee roads, but solely out of the right or advantage of ownership possessed by the Iron Mountain of a road parallel to plaintiff's road. If the East Tennessee road should

sell the tickets demanded by plaintiff it would do no good unless the Iron Mountain would recognize them, which, because of this advantage of ownership, it is not compelled to do under this act. Mr. Circuit Judge Caldwell decided this in the case of The Little Rock & Memphis R. R. Co. *vs.* St. Louis, Iron Mountain & Southern R. R. Co., 41 Fed. Rep., 559, although he gives other reasons also for his judgment in that case perhaps. It is quite true that the facts of that case are not precisely like this in some respects, for there the Hot Springs road, which was the codefendent of the Iron Mountain, had no physical connection at all with the plaintiff road, as the East Tennessee road has here, and the only connection was over the Iron Mountain from Malvern to Little Rock. Yet that fact, in the view we have endeavored to present, becomes immaterial as a distinction in this case because of this fundamental advantage of ownership all the way from both Malvern and Little Rock to Memphis, which advantage operates as well at Memphis in favor of the East Tennessee road as at Malvern in favor of the Hot Springs road, and the want of physical connection or the fact of physical connection with the plaintiff road does not enter into the question of the reasonableness of the discrimination in one's own favor over one's own road. In either case, as we have endeavored to show, the right of preference growing out of the ownership is paramount to any demand of the public for competing lines in determining the reasonableness of the discrimination made in a case like this, and, as Judge Caldwell well remarks, to overthrow this right of preference would be to discourage the building of competing lines rather than to maintain them. The truth is, the plaintiff is a competing line over only a comparatively few miles with the Iron Mountain system, and to force that road to traffic with it would be to give the plaintiff
a share of the profit of the capital invested in the whole Iron
54 Mountain system, just as if it were a part of that road all the
way through instead of a rival road for a part of the distance. This would be an unreasonable discrimination in the plaintiff's favor. It does not seem just that a short road should thus be made equal to a long one in this matter of preserving the public benefit of competition. If the benefit be preserved for the local travel which covers the plaintiff's line that is all it can justly ask, and it has not the right to become a branch of a trunk line under the pretense of competing for a through travel which it cannot accommodate. It does not, in fact, compete for that travel, and cannot complain of discriminations concerning it until it does—that is, can afford equal facilities not only for transferring at Memphis and taking the traveler part of the way but equal facilities with the Iron Mountain for taking him all of the way that road takes him. This statutory right of equal facilities is reciprocal, and one carrier must be able to furnish equal facilities with the other before it can complain of discrimination. The chief facility is a road reaching the same points with its rival about which the discrimination arises. If the Little rock had this I doubt if any combination, by contract or otherwise, would enable the East Tennessee road to discriminate against it lawfully, although there might be, under existing legisla-

tion, no remedy except a criminal prosecution; but in the absence of this competition, in fact, for points beyond Little Rock it cannot be necessary to decide that question.

It may be conceded to counsel for the plaintiff that neither the case of the Atchison, Topeka & Santa Fé Railroad Co. *vs.* Denver & New Orleans Railroad Co., 110 U. S., 667, nor that of The Kentucky & Indiana Bridge Co. *vs.* The Louisville & Nashville Railroad Co., *supra*, controls this. In each of those cases there was a want of physical connection at suitable and properly equipped stations or depots to invoke the requirement of an equal facility for exchange of traffic which distinguishes it from this case. Moreover, in the Colorado case the supreme court interpreted the constitution of the State as declaring only the common law against discriminations, to make it irrepealable, but *non constat* that this third section of the interstate commerce act means no more than the Colorado constitution is interpreted to mean. The language is different, and the historical surroundings of the act of Congress demonstrate that Congress was exercising its plenary power to regulate interstate
55 commerce and not declaring the common law to make it fundamental, for doing only that it had scarcely any reason to act at all, as the Colorado convention had; and in the Kentucky case it was particularly decided that the plaintiff corporation was not a common carrier at all within the interstate commerce act, and this fact and the want of reasonable transfer facilities amply distinguish it from this case. As was said in the Express Cases, 117 U. S., 1, 29, that the regulation of matters of this kind is legislative and not judicial, and the courts can go no further than to enforce what Congress has, in the exercise of its legislative power, declared as a proper regulation of commerce. It has not declared, if it may do so, that a railroad reaching with its own tracks an outlet and inlet for traffic over its own road must share with a parallel road its through traffic to points not reached by its competitor by taking that road's through tickets over its own lines upon equal terms, as to rate or otherwise, with its own traffic. It may be compelled to take up plaintiff's passengers at Little Rock and carry them to the points not reached by the plaintiff's road upon the same terms as other passengers taking its track at Little Rock, but not upon the same terms as passengers taking its track at Memphis for points on its line beyond Little Rock. The two things are not equal to each other, and that reciprocity of equal facilities for equivalent services is wanting, and therefore the case does not fall within the statutory definitions of the discrimination which is forbidden, and if the Iron Mountain road may lawfully decline the tickets which plaintiff would like to issue the East Tennesse Road is not bound to keep them on sale as an equal facility of commerce.

Neither does it seem to me that the case of the Oregon Short Line & Utah North R. R. Co. *vs.* Northern Pacific R. R. Co., 3 Interstate Com. Rep., 205, cited by plaintiff's counsel, controls this case. I find some difficulty in this report of the case (and I am unable to find it elsewhere reported) in comprehending the facts, but I think the peculiarity of this case is not in that—the ownership, namely, by the

defendant road of a parallel track covering all the ground of the plaintiff and extending beyond it to points about which the discrimination complained of has been made. It is true that Mr. District Judge Deady expresses very forcibly his opinion that the law is useless if through routing over an excluded road upon the
56 same terms as the favored road cannot be compelled where the parties cannot agree about it, and if, by an agreement for a continuous through freighting, the discrimination against competitors thereby affected becomes reasonable simply because of a right so to contract at common law, which right Congress possibly intended to modify or regulate by this act, and that which he says is reasonable and plausible, indeed. Yet he does not hold this as applicable to roads situated toward each other as these are, if I understand the situation in that case.

Again, the case of the New York & Northern R. R. Co. *vs.* New York & New England R. R. Co., 4 Interstate Com. Rep., 1, seems very analogous to this case, and the judgment there seems somewhat inconsistent with that given by the Interstate Commerce Commission in this case when it was before that tribunal, notwithstanding an apparent struggle to distinguish them, but it is distinguished in both the opinions written in that case, though upon somewhat different grounds. The Interstate Commerce Commission in the former case dismissed a petition almost identical with the bill we have before us because it had no power and there was none elsewhere conferred by Congress to make through rates and through routings where they were denied, as may be done under the English legislation, although the very conduct complained of in this case was there held to be violation of the act; but in the latter case now under observation, in referring to the former, it seems to concede that there was in this case no violation of the act, for the reasons stated by Judge Caldwell, which are quoted, and have been cited by us here. The opinion, however, further refers to the operation of the right of ownership, and, in effect, holds that, although the defendant companies in the New York & New England case were jointly stockholders in the favored road, they did not own it. If they had owned it I do not see that it could have been at all satisfactorily distinguished from this case, for, while it is true that there had formerly been a through routing between the plaintiff and the defendant, and that fact was seized upon to relieve the commission of the difficulty of making a through route and a through rate for the parties, as they had only to put the old contract "in force again," it is not quite clear how the commission (or the court) has any more power to impose upon an unwilling party an old and abrogated contract than it has
57 to make a new one. Neither is it quite plain how the ownership of all the stock in the favored line by the two defendant companies, jointly operating it for their joint benefit, is not in the practical operation of the freighting business the same thing as if they had owned the road, either or both of them, as a part of their corporate belongings, as in this case the Iron Mountain does, although the technical difference in the tenure (if we may use that

term somewhat untechnically) is apparent. The truth is that in the careful investigation of the cases on this subject which I have endeavored to make I have been occasionally perplexed to reconcile some of the expressions of opinion and judgments with each other, and all the courts and judges seem to find much difficulty in interpreting and applying this act of Congress, which is in all its parts a new and experimental chapter of legislation. I desire, therefore, most carefully to limit this judgment to the precise boundaries of the facts in this case. It would be undoubtedly a complete answer to this bill to hold, as counsel for the defendants so strenuously argue we must hold, that the interstate commerce act has not at all interfer-ed with the common-law right of contracting between connecting and independent carriers for a continuous through line, excluding all connecting competitors or rivals per force of the contract, just as if one owner absolutely owned the whole line; but this case does not require such a holding, nor do I think that, technically, there has been any adjudication to that effect, whatever may be said of expressions of opinion in that direction. It may be that it is a correct doctrine, but certainly that which we hold here can be, whether the other be or not. That about which I have no doubt on the facts of this case is that the Iron Mountain road, being the owner of a road of its own between Little Rock and Memphis, may prefer itself even to the extent of "crushing out the life of the plaintiff," to use the language of the bill and of counsel, by that which was done in this case; that, whether done by a contract with other roads or without, it may refuse to through route with the plaintiff to points on its own road not reached by the plaintiff's road or to recognize tickets issued by the plaintiff or others over plaintiff's roads to such points, and that, having this power of ownership to protect it in doing this, other roads are not at fault in yielding to its refusal to recognize such tickets. It is a mis-
58 nomer to call that which the Iron Mountain is doing "a discrimination" against the plaintiff under the interstate commerce act or any other careful use of that word. It is not the case of a road preferring unjustly, unduly, and unreasonably one of two other equally adequate carriers from a given point to a given point, but the case of a competitor or rival so conducting its business and using its powers of ownership as to divert travel from its rival to itself. This is the case as between the Little Rock & Memphis road and the Iron Mountain road. As between the Little Rock and East Tennessee roads the case is that of preferring a road with through facilities to one with only local facilities, a road that goes all the way to one going only part of the way, and the interstate commerce act does not forbid such a preference. Not having as long a track, the facilities offered by the plaintiff road for its through travel into Texas are not the same nor equal nor equivalent to those offered by the Iron Mountain, and the discrimination it makes between the two cannot be, therefore, unjust, undue, or unreasonable in any proper sense, however disastrous to the plaintiff.

Demurrer sustained and the bill dismissed at the cost of the plaintiff.

So ordered.

59 The United States of America, Sixth Judicial Circuit, Western District of Tennessee.

I, John B. Clough, clerk of the circuit court of the United States for the western division of the said western district of Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect, and correct copy of the entire record and proceedings in said court as the same now appear of record and upon the files in my office in the following cause, to wit:

LITTLE ROCK & MEMPHIS RAILROAD COMPANY
vs.
EAST TENN., VA. & GA. R. R. CO. and THE ST. LOUIS IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY. } No. 422.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office, in the city of Memphis, Tennessee, this 17th day of October, A. D. 1891, and of the Independence of the United States the 116th year.

[SEAL.] JOHN B. CLOUGH, *Clerk.*

[Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. Little Rock & Memphis Railroad Company *vs.* East Tenn., Va. & Ga. R. R. Co., St. Louis, Iron Mountain & Southern R. R. Co.

60 UNITED STATES OF AMERICA:

To the East Tennessee, Virginia & Georgia Railroad Company & St. Louis, Iron Mountain & Southern Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 29th day in October, 1891, pursuant to an appeal from a decree of the circuit court of the United States for the sixth circuit and western district of Tennessee, wherein The Little Rock and Memphis Railroad Company is plaintiff and you are defendants in error, to show cause, if there be any, why the judgment and decree in the said appeal mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 8th day of October, A. D. 1891.

E. S. HAMMOND, *Judge.*

61 [Endorsed:] No. 422. Circuit court of the United States, western district of Tennessee. The Little Rock and Memphis Railroad Co. *vs.* East Tenn., Va. & Ga. R. R. Co., St. Louis, Iron M't. & So. R. R. Co. Filed the 17 day of October, A. D. 1891. J. B. Clough, clerk.

MEMPHIS, TENNESSEE, *October* 17, 1891.

The said East Tennessee, Virginia and Georgia Railroad Company hereby accepts service of this citation.

F. P. POSTON,
Attorney for said Company.

And at same time and place the said St. Louis, Iron Mountain & Southern Railroad Company also hereby accepts service of this citation.

MORGAN & McFARLAND,
Attorneys for said Company.

Endorsed on cover: Case No. 14,917. W. Tennessee C. C. U. S. Term No., 1443. The Little Rock and Memphis Railroad Company, appellant, *vs.* The East Tennessee, Virginia and Georgia Railroad Company & The St. Louis, Iron Mountain & Southern Railroad Company. Filed October 28th, 1891.

Office Supreme Court U. S.
FILED.
NOV 21 1895
JAMES H. McKENNEY,
CLERK.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N

Supreme Court of the United States.

OCTOBER TERM, 1895—TERM NUMBER 65.

THE LITTLE ROCK AND MEMPHIS RAILROAD COMPANY,
Appellant,

vs.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY and THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Appellees.

65

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Memorandum of the Iron Mountain Company (Appellee), as to Jurisdiction of the Supreme Court over this Appeal.

At the conclusion of the oral argument for the appellee, The St. Louis, Iron Mountain and Southern Railroad Company, on the 14th of November, 1895, the Chief-Justice desired a memorandum concerning the

question as to the jurisdiction of the Supreme Court to review in this case the final decree of the Circuit Court in view of the provisions of the act entitled "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891.

This cause was commenced by the complainant as a cause in equity in the Circuit Court of the United States for the Western District of Tennessee, April 13, 1889 (Record, p. 1). Service of process was made April 16, 1889 (Record, p. 4). Joint and several demurrer of the defendants to the bill of complaint (Record, p. 11) was filed July 17, 1889.

From 1889, when this cause was brought, the same was continued from time to time until the May Term, 1891, which May Term extended down to October, 1891 (Record, pp. 14 and 15). *On the first day of October, 1891*, the cause was submitted to the Court and final decree entered on that day, dismissing the bill of complaint for want of equity.

"Thereupon," continues the record entry, "the "said complainant in open court filed its petition, "praying an appeal to the Supreme Court of the "United States from the decision herein; also its "assignment of errors in the said bill is allowed and "bond given and approved and assignment of errors "filed" (Record, pp. 15, 16, 17).

Prior, however, to the decree dismissing the bill, which was on October 1, 1891, the Congress of the United States passed the said act approved March 3, 1891, to establish Circuit Courts of Appeal, &c. Section 5 of said act is as follows:

"SEC. 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision.

"From the final sentences and decrees in prize causes.

"In cases of conviction of a capital or otherwise infamous crimes.

"In any case that involves the construction or application of the Constitution of the United States.

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

"Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases."

Section 6, so far as material, is as follows:

"SEC. 6. That the Circuit Court of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act unless otherwsie provided by law."

Under the above provisions no appeal on October 1, 1891, would lie from a decree of the Circuit Court direct to the Supreme Court in this case, such as was taken in this cause, unless there is some express provision to that effect in some Act of Congress, which, by reason of its special character, or the purpose and manifest intent of Congress, would control the provisions of sections 5 and 6 of the Act of March 3, 1891,

above quoted. We are unable to find any such special provision.

The "Act to regulate commerce," approved February 4, 1887, and commonly called the Interstate Commerce Act, contains in the 16th section a provision that where the Commission has made any lawful order or requirement and the party refuses to obey or perform it, it shall be lawful for the Commission or any company or person interested in the said order to apply to the Circuit Court sitting in equity, &c., for the enforcement of the order. This is followed by the following provisions:

> "When the subject in dispute shall be of the value of $2,000 or more, either party to such proceeding before said Court may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect of security of such appeal, &c."

It seems plain that this provision cannot control the later provisions of the Act of March 3, 1891, and particularly the fifth and sixth sections thereof heretofore quoted, for the reason, *first*, that the above-quoted provision in Sections 15 and 16 of the Interstate Commerce Act relates to a suit or proceedings in the Circuit Court in equity to enforce an order or requirement of the commission, and the present cause is not such a suit or proceeding; *second*, the later Act of March 3, 1891, was intended to be broad and comprehensive, regulating the jurisdiction of the various courts of the United States, and particularly the appellate jurisdiction of the Circuit Court of Appeals and of this Court, and it would control the prior provisions contained in the Interstate Commerce Act. The result is that the Supreme Court has no jurisdiction and this appeal should be dismissed.

A copy of this memorandum has been sent to the attorney for the appellant, who has our permission to file any answer to this memorandum that he shall be advised within ten days.

November 21st, 1895.

JOHN F. DILLON,
WINSLOW S. PIERCE,
RUSH TAGGART,
For the Appellee the Iron Mountain Railway Company.

Office Supreme C
FILE
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JAMES H. McKE

In the Supreme Court of the United States.

LITTLE ROCK & MEMPHIS RAILROAD COMPANY

v.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY AND ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

BRIEF FOR APPELLANT.

U. M. ROSE,

G. B. ROSE.

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

In the Supreme Court of the United States.

LITTLE ROCK & MEMPHIS RAILROAD COMPANY

v.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY AND ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

BRIEF FOR APPELLANT.

STATEMENT.

The Little Rock and Memphis Railroad Company is engaged in operating a railroad between the cities of Memphis, Tenn., and Little Rock, Ark., formerly known as the Memphis and Little Rock Railroad. The St. Louis, Iron Mountain and Southern Railway Company has a railroad running from St. Louis, Mo., to Texarkana, on the boundary line between Arkansas and Texas, with numerous branches; and it controls every railroad running north, south or west from Little Rock. The East Tennessee, Virginia and Georgia Railway Company operates an extensive system east of the Misssissippi, with its western terminus at Memphis.

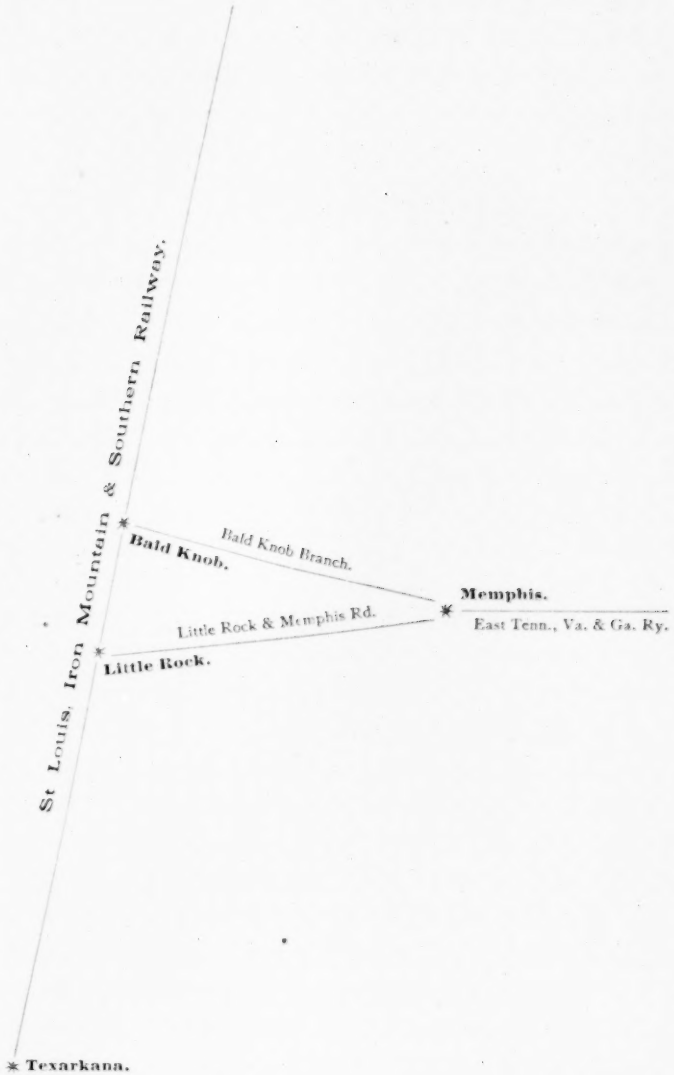
In 1888 the St. Louis, Iron Mountain and Southern Railway Company built a branch line running from Bald Knob, Arkansas, to Memphis, called the Bald Knob Branch. This is parallel to the line of the complainant and was built expressly for the purpose of competition. Its facilities for transacting the business at Memphis are inferior to those of the complainant. Its depot is two miles distant from that of

the East Tennessee, Virginia and Georgia Railway Company and the transfer is made in omnibuses over rough streets. The trains of the two roads are run without much regard for one another, so that passengers transferring between them are subjected to annoying delays. Between the depot of the complainant and that of the East Tennessee, Virginia and Georgia Railroad Company there is a track over which the passengers are transferred in a railway coach, and frequently without change of cars. Its trains are run with a view to meeting those of the East Tennessee road, so that passengers are subjected to no delays.

In consequence of these superior facilities the opening of the Bald Knob branch produced no sensible effect upon the passenger traffic of the complainant, the traveling public ordinarily preferring to go by its road. The Iron Mountain Company has therefore resorted to the device of directing all its connections to take off all tickets reading over the Little Rock and Memphis Railroad in conjunction with its own, and to sell through tickets to southern and western points only over the Bald Knob Branch, to which the East Tennessee road has made itself an active party.

The principal traffic of the complainant is through traffic, consisting of the transportation of passengers and freight from points in the East to Southwest Arkansas and Texas; and the Iron Mountain road controlling all the western and southern exits from Little Rock, the success of the proposed scheme involves the absolute destruction of the complainant. Perhaps the matter will be made clearer by the following diagram:

NORTH.


St Louis, Iron Mountain & Southern Railway.
Bald Knob Branch.
Bald Knob.
Memphis.
East Tenn., Va. & Ga. Ry.
Little Rock & Memphis Rd.
Little Rock.
Texarkana.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the refusal of the defendant, the East Tennessee, Virginia and Georgia Railroad Company, to sell through tickets to points beyond Little Rock over the line of the railroad of the complainant, while selling such tickets to such points over the parallel and competing line of the St. Louis, Iron Mountain and Southern Railway Company, was not a violation of the third section of the act of Congress of the United States entitled "An Act to Regulate Inter-State Commerce," approved February 4, 1887.

2. The court erred in refusing to enjoin the East Tennessee, Georgia and Virginia Railroad Company from selling such through tickets over the line of the St. Louis, Iron Mountain and Southern Railway Company while refusing to sell the same over the line of the complainant.

3. The court erred in refusing to enjoin the defendant, the St. Louis, Iron Mountain and Southern Railway Company, from refusing to transport passengers carried upon such through tickets as aforesaid over the complainant's line while transporting them upon such through tickets over its own line.

ARGUMENT.

This suit involves one of the most important questions that can arise under the act to regulate interstate commerce, the requirement that railroad companies shall extend to one another equal facilities for the transaction of business. Before the passage of that act there was substantially nothing gov-

erning the mutual relations of railroad companies. They warred with one another, and destroyed each other very much at will, and often to the great inconvenience of the public. When a strong railroad ran parallel to a weaker one, it would give notice to its connections that it was not friendly with its weaker rival, and that they must not sell tickets over the two together, as such tickets would not be honored; and it would threaten all roads which disregarded its injunctions with the pains of its displeasure. It was strong, and could give to its favored connections a great deal of traffic. Its competitor was feeble and of inferior consequence. Forced to choose between the two, the connecting lines naturally went with the stronger. An effectual boycott was established against the victim. Every man's hand was against it. Its traffic diminished; its earnings fell off; its rolling stock wore out, and was not replaced; its track became unsafe, and it transported its passengers at the risk of their lives. Its securities depreciated and grew worthless, and finally the rival bought it in for a trifle.

But this operation was by no means advantageous to the public. Such persons as lived along the line of the weaker company were forced to travel in dilapidated cars over a decaying and dangerous road; and when the stronger had devoured its competitor, it became a monopoly, indifferent to public demands. Its tracks and equipments were suffered to fall into neglect, its servants became impolite and unaccommodating, and the public suffered all the evils inseparably attendant upon monopolies.

It was then felt that it would be a great deal better to

put an end to these combinations by which the weak companies were being destroyed, and the railroad business of the country concentrated in the hands of a few great systems. It was felt that competition was the life of trade; that if each road had a competitor able to hold its own, it would improve its rolling stock, lay down new rails, require politeness and attention to the wants of travelers on the part of its servants, and do everything it could to make travelling and the shipment of freight over its lines as safe and pleasant as possible. It was found that there was a good deal of human nature even in railroad officials, and that the possession of irresponsible power was apt to make them careless and indifferent to the public welfare.

One of the objects of the act to regulate commerce, was to put a stop to these wars between rival companies. Its third section is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act, to make or give, any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever.

"Every common carrier subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving,

forwarding and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines."

Let us examine the act in detail.

By the first paragraph it is provided that no undue or unreasonable preference or advantage shall be given to any corporation or individual.

Here the entire advantage is given to the Iron Mountain Railroad. By an arbitrary regulation all passengers, though they may prefer the complainant's line, are forced to go over the Iron Mountain road, or to pay local rates, recheck baggage and purchase new tickets at every place of transfer. All passengers are thus virtually compelled to patronize the Iron Mountain route, however much it may be against their wish. If this is not giving an undue preference to the Iron Mountain route the term is difficult to define.

Again, by the same section it is provided that no corporation or individual shall be subjected to any undue or unreasonable prejudice or disadvantage.

By the arrangement now under consideration it is proposed arbitrarily to transfer all the business of the complainant to its competitor, though this involves the forcing of traffic out of its natural and accustomed channels.

To say that depriving the complainant of all its business by refusing to make with it the same traffic arrangements which are made with its rival, is not subjecting it to undue and unreasonable prejudice and disadvantage, is manifestly untrue.

By the second paragraph it is provided that connecting carriers shall afford to each other all reasonable, proper and equal facilities for the interchange of traffic.

Are the facilities equal when through tickets are sold over one line and refused over the other? Are they equal when passengers over one line go through without being annoyed with the repurchase of tickets and rechecking of baggage, and over the other are subject to these inconveniences? When a close union is entered into between two roads, and all the customary courtesies and comities denied to the rival of one of them? When everything is done to force travel over one line and to deter it from proceeding over the other?

If any person were asked what was the greatest incidental facility of modern railway travel, he would be almost certain to reply that it is the system of through tickets and checking, which enables the voyager to go to his destination without continually leaving his train to repurchase tickets, and to dispense with all care of his baggage. So great is the importance of this facility that no man intending to enter upon a journey will think of going by a line which does not sell through tickets if he can find another which does; and to sell through tickets over one line and refuse them to a competitor simply involves the destruction of the traffic of the latter.

It would no doubt have been a great deal better had our act followed the later English act, and required through tickets upon all connecting roads. Nothing would have done more to decrease the inconveniences of traveling. But while our act does not provide for this, it does provide that the

facilities shall be equal between connecting carriers. The Tennessee Railroad is therefore not bound to issue through tickets unless it chooses to do so. It may refuse them alike to the Iron Mountain and to the complainant. In doing so, though it would be imposing a great hardship upon the public, it would be acting within the scope of its legal rights. But that is not what it is doing. It is making through rates with the Iron Mountain, while refusing them to its rival. It is granting to one facilities denied to the other.

In support of its position it says that it has been the immemorial custom of railroads to act in this manner. As well might the Fijian claim that the ancient usages of his revered ancestors justified his cannibal propensities. It was just because of such usages, and to put an end to them, that the act to regulate commerce was passed. It was just because those usages were not satisfactory to the public nor consonant with correct principles that legislation became necessary.

The Iron Mountain road says that it is not infringing the act because it grants equal facilities to all its connections at Memphis. But the East Tennessee does not. It refuses to the complainant the facilities which it grants to the Iron Mountain, and it does this at the express request of that company. The latter is therefore an accessory before the fact to the breach of the law, and amenable to justice as a principal.

The second paragraph also provides that there shall be no discrimination in rates and charges between connecting lines.

This provision has been flagrantly violated. Over the

Iron Mountain route through tickets at reduced rates are sold, while passengers over the complainant's line are forced to pay the much higher local rates. This of course is in open contravention of the act, and, if permitted, is of itself sufficient to put an end to all traffic over complainant's road.

To prevent such conspiracies as this is the main purpose of the Interstate Commerce Act. Selfish men in control of railroads have been accustomed to enter into all manner of combinations to increase their own gains at the expense of their competitors and of the public. In this way they have continually enhanced the price of transportation and forced traffic into unnatural channels. At length the evil became intolerable, and Congress was compelled to interfere. Under the new law the old state of anarchy must come to an end. Every road must grant to all others the same equal facilities. Each must be run upon its own merits, and must depend for its support upon the legitimate patronage which it receives. If its cars are commodious, its track good, and its hours convenient, it will be chosen by travelers; but if not, the public cannot be forced by combinations and conspiracies to patronize it against their will.

The complainant demands nothing unreasonable. It simply asks that it be put upon an equal footing with its adversary and that every one be left free to choose between them. Owing to its shorter line and its better connections it has hitherto enjoyed the greater part of the business. Now it is sought to force the public to take a different route; a route which they do not willingly adopt, and passage over which involves annoying delays and failures of connections.

This question is one of life and death for the complainant. It is a short and a weak road. Its western outlets are all in the hands of its adversary, and if the system now sought to be put in force is to be allowed it must perish. Will it be for the public good that it should do so? When it has been devoured will travelers be better served? When the Iron Mountain has a monopoly will it consult the interest of the public? Will it improve its rolling stock and its track? Will its servants be more polite and considerate? We should rejoice to think that such would be the case; but we fear that too much of the leaven of human depravity still exists even in the breasts of railroad officials to permit the indulgence of such a hope.

All the decisions enforce the construction for which we contend.

The case of the *Little Rock and Memphis Railroad Co. v. St. Louis, Iron Mountain and Southern Ry. Co. and the Hot Springs Railroad Co., 41 Fed. R., 559,* is wholly inapplicable. There it appeared that the Hot Springs road ran from Hot Springs to Malvern. The Little Rock and Memphis road ran only to Little Rock, and between that point and Malvern there was no connection save over the Iron Mountain road. That was therefore a naked attempt to secure compulsory through rates. Had the Little Rock and Memphis road run to Malvern, and there demanded an interchange of traffic on the terms granted the Iron Mountain, the case would have been similar to the one at bar, and there can be little doubt that the injunction would have been awarded.

The Colorado Constitution contains a provision substantially the same as the first clause of the section above quoted, but contains nothing like the second clause of the section. In the case of the *A., T. & S. F. R. R. v. D. & N. O. R. R., 110 U. S., 668*, it appeared that the D. & N. O. R. R. had made connection with the A., T. & S. F. R. R. at a point a mile and a half from its depot, and demanded that the A., T. & S. F. R. R should interchange traffic with it at that point on the same terms as with railroads which ran into its depot; but the court held that as no facilities were provided at this intersection, and the interchange of business there could be carried on only at great expense to the A., T. & S. F. R. R. Co., and at great peril to the public, owing to the necessity of using the main track for switching and the making up of trains, it was not proper to require the latter company to accept cars at that point. What would have been the decision of the court had the D. & N. O. R. R. run into the depot of the A., T. & S. F. R. R., as did the other connecting companies, is entirely plain from the last clause of the syllabus, which is as follows:

"A provision in a State Constitution which forbids a railroad company to make discrimination in rates is not violated by refusing to give to a connecting railroad the same arrangement as to through rates which are given to another connecting line, *unless the conditions as to the service are substantially alike in both cases.*"

In the case of the *Ken. & I. Bridge Co. v. L. & N. R. R. Co., 37 Fed. R., 567*, the facts were substantially the same as the last case.

A new bridge and railroad company made connection with the Louisville and Nashville Railroad on Seventh street in Louisville, and insisted that freight should be interchanged at that point on the same terms as with the companies running into the depot of the Louisville and Nashville road. Every time a car was left at Seventh street the Louisville and Nashville road would have had to send a switch engine after it, and bring it down to its depot to be made up into its trains. To make up trains on the public streets would have been out of the question, and would have been a constant menace to the public safety. Judge Jackson very properly refused to require an interchange of business at such a point, but said that if the new company would run its trains into the Louisville and Nashville depot, as did the other connecting roads, it would be entitled to equal terms. The 19th section of the syllabus is as follows:

"The fact that a railroad company interchanges traffic with certain railroads at its regular established yard or depot, (where it has provided all reasonable, proper and equal facilities for that purpose), and refuses to interchange traffic with a new road at a point of connection where no such facilities exist, does not constitute any discrimination or undue or unreasonable preference or advantage in favor of the railroad with which interchange is made. The third section of the act does not mean that whatever facilities a railroad company may furnish or provide for the interchange of business with connecting lines at any one place, (such as its regularly established and properly equipped depot), it is bound to provide for any and all other railroads at such other and different

points as they may select in making their connection. On the contrary said section means that where a railroad, subject to the provisions of the act, has provided and established at any given place its facilities in the shape of yards, stations and depots for the interchange of traffic, or for the receiving, forwarding and delivering of passengers and property, and there affords such facilities to some of its connecting lines, it shall not deny to other connecting lines at that point the same proper, reasonable and equal facilities."

Kentucky & I. Bridge Co. v. Louisville & N. R. Co.. 37 Fed. Rep., 570.

When the case now before the court was before the Interstate Commerce Commission, that tribunal decided that the action of the defendant companies was clearly in contravention of the act, but that the commission was not invested with the power to remedy the grievance. After showing the identity of the third section of our act with the second section of the English act of 1854, and that the English decisions would require the equal interchange of traffic under the circumstances, the commission proceeds:

"In the light of these considerations there can be little doubt that the line here in question is one that under the English law would be regarded as a reasonable route, and one the retention of which would be considered to be in the interest of the public. In fact it is fifteen miles shorter than the route now in use between Memphis and Little Rock, and it is a route of long standing, only recently discontinued. A new line has been established by a powerful competitor, which is physically competent to handle the traffic. The

interest of the public however fairly seems to require that the old line should be kept open as a part of a through route from Memphis and points east thereof to Little Rock, and points west and south thereof. The East Tennessee, Virginia and Georgia Railway, in selling its tickets to points beyond Little Rock, discriminates against the Memphis and Little Rock Railroad by refusing to sell tickets reading over this line. This results in exacting higher rates for passengers seeking this route than for through tickets sold via Bald Knob. Such passengers are compelled to buy tickets from point to point at local rates, and they are deprived of the facilities which through tickets and through checking afford.

"Giving to the words in the third section the interpretation received by the present English statute, and applying the interpretation to the facts of the present case, it would require the two defendant roads to afford complainant equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers to and from their several lines, facilities equal to those afforded any other line, provided only that the proposed route is a reasonable route, and one the opening or the maintaining of which is fairly in the interest of the public. Our law also adds the prohibition against discrimination in rates and charges between connecting lines, a prohibition which easily fits the present case, in view of the fact that travel seeks the cheapest route, and that the through rates in force over the Bald Knob Route are in many cases considerably lower than the local rates, which are alone available to passengers choosing complainant's line.

"The contention would still remain open to the defendants however that a carrier has a right to discriminate in its own favor, that it is not intended to be restrained by the law from taking to itself all possible traffic that its own line can advantageously handle, and that it is not compelled to divide business with a competitor by affording equal facilities therefor between points where its own road is parallel.

"In this respect the defense of the East Tennessee, Virginia and Georgia is that the St. Louis, Iron Mountain and Southern Company, controlling the various routes beyond Little Rock, requires it to sell tickets by way of Bald Knob exclusively for the purpose of throwing all the through travel between Memphis and Little Rock upon the new line of the Iron Mountain Company; and it says that it would not be justified in selling tickets to passengers via Little Rock and Memphis road, knowing in advance that such tickets would not be accepted when offered for transportation beyond Little Rock. This position is admitted by the St. Louis, Iron Mountain and Southern Railway Company to be correct, and it justifies its action by saying, in substance, that it refuses to accept through tickets from the East Tennessee, Virginia and Georgia over the Little Rock and Memphis road, when tendered by passengers coming upon its cars at Little Rock, in the exercise of a right to do so, which it claims upon the theory that while discrimination between connecting lines is forbidden, the law does not forbid it to discriminate in favor of a section of its own line as against a competing line.

"This claim presents an aspect of apparent justice, which has a tendency to conceal from view the public considera-

tions which may be conceived to have been present in the framing of a law designed to promote and facilitate the unrestricted ebb and flow of the internal commerce of the United States; an act which contains a provision apparently designed to insure to the people every facility of equal choice which franchises granted in the public interest can by any combination of reasonable routes afford. The section contains no proviso excluding lines owned by the discriminating carrier; the terms of the law are general; the language used in this respect cannot fairly be given any different interpretation from that which the English statute of 1854 should receive; and there has been no hesitation whatever in the affirmation that the English law applies as well to cases where business is sought to be divided with the carrier controlling the rate, as to cases where the rights of other carriers only were involved."

L. R. & Mem. R. R. Co. v. E. Tenn., Va. & Ga. R. R. Co., Interstate Commerce Committee Reports, vol. 3, p. 10.

When this case was before the Inter-State Commerce Commission that tribunal decided that the action of the appellees was in plain violation of the intention of the act, but that the Commission had not been clothed with power to redress the wrong. Since then however the Commission has changed its views upon this point.

The case of the *New York and Northern Rd. Co. v. New England Rd. Co., et al., 4 Inter-State Commerce Com. R., 702*, appears to be in its essential particulars identical with the case at bar, and to present for consideration the

same questions. In that case Judge Cooley, in holding that relief should be granted, says (*p. 720*):

"When therefore the statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the statute it is only a meaningless enactment. It is not material that the true construction of this provision may heretofore have been in doubt, or even that it may have been misunderstood. The matter of importance is to ascertain the real intention of the statute, and to give that intention just effect.

* * * * * * * * * * *

"The statute, in forbidding discrimination in rates and charges between connecting lines, assumes that a carrier determines for itself, or in conjunction with another carrier, as the petitioner and the principal defendant did in this case, reasonable rates upon the traffic interchanged, and that the standard of reasonableness so voluntarily fixed becomes also the standard for interchanging with another carrier similarly situated. With the main duty, equality in treatment, enforced by the statute, the various incidents of interchanging through traffic, such as joint through rates and through billing, which are matters of economy and convenience both to

carrier and to the public, are very likely to follow and to be worked out by the carriers themselves without the intervention of any public authority. Parties, whether persons or corporations, may naturally be expected to do what is manifestly conducive to their own interest. The objection therefore that neither the commission nor a court has been clothed with authority to require carriers to enter into contracts for continuous carriage at joint through rates or upon through bills does not apply to the enforcement of the prohibition against discrimination in rates. That must be enforced because it is the law, and the matter of want of power to compel entering into contracts is irrelevant to the question."

Such is the state of the few authorities in this country. The later English authorities can throw no light upon the question owing to the difference of the statutory provisions. The earlier ones are fully considered in the opinion of the Interstate Commerce Commission upon this controversy. (*3 Interstate Com. Com., R. 10.*)

It seems plain that the action of the defendants in combining together for the purpose of excluding the appellant from all participation in the traffic is a clear violation of the law. The Interstate Commerce Commission has so declared it to be, but has also declared that it has no power under the act to afford redress. That may well be. It is a tribunal of limited powers. But it is not to be conceived that there is a legal wrong for which the law does not undertake to afford a remedy. Many moral delinquencies are not within the reach of the courts, because they involve no violation of the law; but when the law is violated there must be a method

of redress. In this case it would seem to be an extremely facile matter to frame a decree that would accomplish the desired result.

1. The St. Louis, Iron Mountain & Southern Railway Company can be enjoined from refusing to honor tickets reading over the appellant's line so long as it honors those reading over the Bald Knob branch.

2. The East Tennessee, Virginia & Georgia Railroad Company can be enjoined from issuing through tickets by way of the Bald Knob branch, unless the St. Louis, Iron Mountain & Southern Railway Company will honor through tickets by way of the appellant's line.

Respectfully,

U. M. ROSE,

G. B. ROSE.

Supreme Court, U. S.
FILED
NOV 15 1895
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 965. 65

THE LITTLE ROCK AND MEMPHIS RAILROAD COMPANY,
Appellant,

vs.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY and THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Brief for The St. Louis, Iron Mountain and Southern Railway Company.

JOHN F. DILLON,
WINSLOW S. PIERCE,
RUSH TAGGART,
Of Counsel.

C. G. Burgoyne, Cor. Walker and Centre Sts., New York.

In the Supreme Court of the United States.

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY

vs.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY and ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Brief of the St. Louis, Iron Mountain and Southern Railway Company.

The statement of facts in the brief of appellant discloses generally the facts as to the location of the several lines of railway involved in this controversy, and also of the manner in which they connect with each other at Memphis and Little Rock. The bill of the complainant in this case, to which demurrer was filed, was evidently based not upon any claimed common law obligation of the defendants, but upon alleged rights created by the interstate commerce act, and especially by the third section of that act.

The allegations of the complaint are that the complainant is engaged in operating a railroad between the cities of Memphis and Little Rock; that the St. Louis, Iron Mountain and Southern Railway Co. operates a

railroad from the City of St. Louis to Texarkana, and there makes connections with extensive systems of railroads in Texas; that the East Tennessee, Virginia and Georgia is engaged in operating railroads in Tennessee and other States for which it is named, and has its western terminus in the City of Memphis; that in May, 1888, the St. Louis, Iron Mountain and Southern Railway Co. opened a branch from Bald Knob to Memphis parallel with the line of the complainant, and built for the express purpose of competing with it; that it is fifteen miles longer than the complainant's line and its facilities at Memphis are inferior to the complainant's. Thereupon the bill alleges:

"for the purpose of breaking down the legiti-
"mately acquired business of your orator and crushing
"a rival, the St. Louis, Iron Mountain & Southern
"Ry. Co. has directed all railroads connecting at
"Memphis to call in all through tickets reading over
"the Little Rock & Memphis Railroad and then over
"the St. Louis, Iron Mountain Railway, leaving on
"sale only the through tickets over the Bald Knob
"Branch; and the East Tennessee, Virginia & Georgia
"Railroad Co. has signified its assent to this direction,
"and has since July 1, 1888, actually withdrawn the
"tickets of your orator's line, in connection with the
"St. Louis, Iron Mountain & Southern Ry., but still
"continues to sell tickets over the Bald Knob and the
"St. Louis, Iron Mountain & Southern Railway, all
"of which is in direct contravention of the provisions
"of the act of Congress entitled 'An Act to regulate
"'commerce,'" approved February 4, 1887. Your
"orator therefore prays for process of subpœna
"against the said defendants named in the caption
"and for a mandatory injunction against the said de-
"fendants, requiring them to afford your orator the
"same equal facilities as are afforded to any other
"connecting road, and for such other relief as may be
"deemed equitable" (Record, p. 2).

The demurrer which was filed to the bill by the defendants was sustained and the bill dismissed.

The complainant assigns as errors the following:

FIRST. The court erred in holding the refusal of the defendant the East Tennessee, Virginia and Georgia Railroad Company to sell through tickets to points beyond Little Rock over the line of the railroad of the complainant, while selling such tickets to such points over the parallel and competing line of the St. Louis, Iron Mountain and Southern Ry. Co. was not a violation of the third section of the act of the congress of the United States, entitled "An Act to regulate inter-" state commerce," approved February 4, 1887.

SECOND. The court erred in refusing to enjoin the East Tennessee, Virginia and Georgia Ry. Co. from selling such through tickets over the line of the St. Louis, Iron Mountain and Southern Ry. Co., while refusing to sell the same over the line of the complainant.

THIRD. The court erred in refusing to enjoin the defendant the St. Louis, Iron Mountain and Southern Ry. Co. from refusing to transport passengers carried upon through tickets as aforesaid over the complainant's line, while transporting them upon such through tickets over its own line (Record, p. 17).

Upon the record in this case there are, therefore, but two questions involved for consideration by this Court: First, whether the Circuit Court rightly construed the third section of the interstate commerce act; and, second, even if it should be held that the construction of this section of that act was erroneous, whether complainant is entitled to the relief demanded in his bill, viz., an injunction enjoining the East Tennessee, Virginia and Georgia Railroad Company from selling through tickets over the line of the St. Louis, Iron Mountain and Southern Railway Company while refusing to sell the same over the line of the complainant; and also whether it is entitled to enjoin the defendant the St. Louis, Iron Mountain and Southern Railway

Company from refusing to transport passengers carried on through tickets over the complainant's line, while transporting them upon such through tickets over its own line.

The contentions of the defendant the St. Louis, Iron Mountain and Southern Railway Company will be :

FIRST. That upon no proper construction of the third section of the interstate commerce act under the facts set forth in the bill does it require the St. Louis, Iron Mountain and Southern Railway Company to enter into arrangements with the complainant which involved through rates and through tickets to points south of Little Rock.

SECOND. If the defendant is wrong in its construction of the third section of the interstate commerce act, and it is required to enter into such arrangements with the complainant under the conditions of this case, then the defendant insists that the proper remedy for the enforcement of such duty is not by bill in equity, but by proceeding in mandamus, or by suit at law for damages.

ARGUMENT.

A fair consideration of the language of section 3 of the interstate commerce act would seem to be all that is necessary to combat the construction which is sought to be put upon it by the appellant in his brief. The first paragraph is as follows :

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to

any particular person, company, firm, corporation or locality or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In the brief of plaintiff, at page 7, this paragraph seems to be relied upon on the ground that an undue preference is given by the arrangements between the defendants to the Iron Mountain route as against the complainant's route. It is evident, however, that this portion of this section has no just application to any such conditions as exist between these parties. The undue or unreasonable preference which is forbidden by this part of Section 3 is an undue and unreasonable preference as to shippers doing business with the carrier and does not refer to any arrangements which the carriers may make with each other. The language used indicates that the paragraph is aimed at securing as between different classes of shippers at the same point, or at different points, upon the line of the carrier's railway, exact and even-handed justice and equality. It does not in any respect attempt to regulate or provide for the methods and principles under which one carrier shall meet and deal with another carrier engaged in the same general line of business.

The complainant in its brief concedes that this paragraph is substantially the same as a provision of the Constitution of Colorado, which was construed adversely to its contention in A. T. & S. F. Rd. Co. vs. D. & N. Rd. Co., 110 U. S., 667 (Brief, p. 12).

The next paragraph of the act deals with the relations of carriers to each other and is as follows :

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivery of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The foregoing paragraph, therefore, deals with the matter which is complained of in this case, viz., the proper basis upon which defendants are required to deal with the complainant as a connecting carrier with them at Memphis. This paragraph, it is claimed by the complainant in its brief, in its fair and reasonable construction, requires that whatever facilities and arrangements by way of interchange of business, of making through rates, of uniting in selling through tickets, of allowing one company to act as the agent of the other, of accepting, respectively, the tickets sold by the other company, exist as between the defendants must likewise be conceded by each of them to the complainant. This is the argument in the brief of the appellant, and nothing short of this will satisfy the claims of the complainant. Such right in the complainant, it is clear from the holdings of this Court, must rest not upon any common-law obligation of the defendants, but purely and strictly upon the provisions of the statute. The case of the Atchison, Topeka & Santa Fe R. R. Co. vs. Denver and New Orleans R. R. Co., 110 U. S., 667, clearly settles the proposition, that at common law no such obligation as is claimed on behalf of the appellant in this case ex-

ists. Does it arise by virtue of any section or provision of the interstate commerce act? The Bill of the complainant, the assignment of errors, and the brief of the complainant suggest, Sec. 3, as the only foundation for the duty on the part of the defendants. The language used in Sec. 3 seems to us so far from indicating any intention to affix any such obligation to common carriers as to indicate the opposite purpose. The obligation of connecting carriers to each other is defined as being

> " to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines,"

indicating, as also in the subsequent part of the paragraph, that the lines of each are to be kept distinct, and separate, and that what is intended is that facilities shall be provided for the interchange from one to the other of the traffic between those separate lines, and for the receiving, forwarding, and delivering of passengers and property, to and from their several lines. But the obligation imposed in this paragraph seems to be one that allows great flexibility to the carriers and discretion to them as to what shall be the means adopted for the promotion of this interchange of traffic. The measure of it is "according to their *respective* powers," and the definition of it is all " reasonable, proper and equal facilities." The only prohibition that is found in the section is that " they shall not discrimi- " nate in their rates and charges " between such connecting lines. The fair inference from this language would seem to be, not that absolutely the same provisions shall be made to each of several connecting carriers in the matter of traffic facilities

and transfer facilities, for the interchange of traffic, and the delivery of passengers and property to and from their several lines, but, so far as the circumstances, conditions and amount of traffic, etc., etc., allow, that they will afford each to the other reasonable and proper facilities, it being clearly left, however, to the discretion of the several carriers acting fairly and honestly. But in their rates and charges absolute equality for the same service is required, a matter in which no discretion need be granted to the carriers. But this interchange of traffic which is spoken of here, and which is the extent of the requirement, is a very different thing from an agreement by which one carrier shall be permitted to bill goods over the line of the other, or to sell tickets to passengers good over the line of the other, and which will be accepted by the other, collecting in the one case, the entire freight at the commencement of the transportation, and in the other the entire passage money, and becoming as to the proportion to which the second carrier is entitled a debtor to the second carrier. Such an arrangement evidently would involve different considerations from those which would arise in the mere interchange of traffic, in which the one carrier, having terminated the carriage as to its line, would become for the time being the forwarder or shipper as to the other carrier's line, and where the same conditions would obtain as in the case of any other carrier or shipper, viz., that the carrier could demand prepayment of the freight before receiving the same and being compelled to haul it.

Effect must also be given to the concluding clause of the paragraph which is as follows :

"Providing that the section shall not be construed "as requiring any such common carrier to give the use "of its tracks or terminal facilities to another carrier "engaged in like business."

If this section were construed so as to provide for the absolute equality as between connecting carriers, as contended by the complainant in his brief, it would absolutely nullify this concluding paragraph of section three, because the effect of it would be to incorporate the complainant's road as a branch of the Iron Mountain as effectually and completely as though it were owned by it and operated in its interest. It would give to the complainant the entire use of the entire system of tracks and terminal facilities owned by the defendant Iron Mountain Company south of Little Rock as effectually and completely as though those tracks and terminal facilities were owned by the complainant. Owning no tracks south of Little Rock, investing no capital in the laying of tracks or acquiring terminal facilities, subject to no risks in any such investment, the complainant would be, as to all through traffic which the Iron Mountain is now in a position to contract at Memphis with its co-defendant to deliver to points south of Little Rock by the use of its own facilities, in exactly the same position as the Iron Mountain itself, competing for the traffic to all such points and doing business with them as completely and as efficiently as though it had itself constructed tracks to all the points reached by the Iron Mountain Company's roads. If this is not, contrary to the provisions of Section 3, giving to the complainant all the advantages of the use of the tracks of the Iron Mountain Company and of its terminal facilities in Texarcana and other points south of Little Rock, it is difficult to understand what

would constitute a violation of this provision of Section 3.

That section three was not intended by its authors to have so broad a scope as is contended for by the complainant seems to be borne out by the language of section 6 of the act in the paragraph requiring every common carrier to file with the Commission copies of all contracts and agreements relating to traffic affected by the provisions of the act. After providing generally for the filing of all contracts of that character the section proceeds:

"And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares, or charges for such continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with said Commission. Such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable."

This language seems clearly to indicate that the matter of such joint tariff rates is a matter of special agreement and arrangement as between the respective carriers, and is something that may or may not exist, as the carriers themselves may determine, notwithstanding the provisions of Section 3 of the act.

The construction of the interstate commerce act above set forth, which we submit is the natural and reasonable construction of the language of the act, is that which has received the sanction of the courts in almost every case which has been submitted to them in which this question has been involved. The question, we believe, first came before the courts in the case

of the Kentucky and Indiana Bridge Co. vs. Louisville and Nashville R. R. Co., in January, 1889, in the Circuit Court for the District of Kentucky. The opinion in the case is by Judge JACKSON. The case involved an alleged discrimination by the defendant the Louisville and Nashville R. R. Co. against the complainant, in this, among other respects, that the Louisville and Nashville R. R. Co. refused to make with the complainant such arrangements for through rates for freight and passengers at Louisville as it was freely making with other companies. This case is reported in 37 Federal Reporter, 567. Judge JACKSON thus considers the question involved in this case at page 628:

"The third section prevents the making or giving of any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, locality or traffic, or the subjecting of any person, company, firm, corporation, locality or description of traffic to any undue or unreasonable prejudice or disadvantage; and by its second clause requires common carriers to afford all reasonable and proper and equal facilities for the interchange of traffic, and for the receiving, forwarding and delivering of passengers and property between their lines and those connecting therewith, and prevents them from discriminating in their rates and charges between such connecting lines, but without requiring any such common carrier 'to give the use of its tracks and terminal facilities to another carrier engaged in like business.' Now, under this last limitation, or qualification of the duty of affording all reasonable, proper and equal facilities for the interchange, or for the receiving, forwarding and delivering of traffic to and from and between connecting lines, it is clearly left open to any common carrier to contract or enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another

that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines. It is equally clear from the provisions of Section 6 of the act that two or more common carriers may lawfully enter into contracts or agreements for the establishment and operation of through routes at or upon joint through rates. Copies of such contracts and agreements have to be filed with the Commission. * * * If, in the exercise of the right thus impliedly, if not expressly recognized, a common carrier by private arrangement forms a through route and establishes joint through rates, fares or charges with certain connecting lines, is it compelled to concede to all other connecting railroads the same or equal through rates on traffic which the latter may offer for transportation? It is settled by the case of Atchison, etc., R. Co. vs. Denver, etc., R. Co., 110 U. S., 668, 4 Sup. Ct. Rep., 185, that neither at common law nor under the constitution of Colorado (section 6), providing that all individuals, associations and corporations shall have equal rights to have persons and property transported on any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, does the refusal of a common carrier to make through traffic arrangements at or upon joint through rates with one connecting railroad company, such as it makes or enters into with another connecting line, constitute any undue or unreasonable discrimination in charges or facilities. That decision is conclusive of the present question, unless some provision of the act to regulate commerce has expressly or by clear implication provided otherwise. * * * Is it a public duty imposed by the act to regulate commerce that every common carrier, subject to the provisions of that law, shall concede or afford through routeing and through rates to all connecting lines, whenever and so long as it voluntarily makes or enters into such arrangements with any connecting line?

After a careful examination of the act and the arguments of counsel, and authorities cited, we fail to discover any such requirements. In the report of the commission in the case of Railroad Co. vs. Railroad Co., I. Interstate Commerce Comm. Rep., 94, it is

well and properly said in reference to through tickets, that 'such tickets very evidently are a great convenience to travelers, and perhaps to connecting roads; but they are a part of the voluntary arrangements for business purposes, like joint tariffs, interchange of cars, and common use of depots. It being, therefore, under our statute, a matter of mutual agreement, whether coupon or through tickets shall be sold by a railroad company over roads of other companies, it follows that the form of such tickets, and the manner of their sale, are also matters of agreement by the companies interested. If companies can agree upon their tariffs, the form of their tickets, and how they shall be sold, they have the right to do so, and by such agreement become interstate carriers; but if they cannot agree, the act does not undertake to coerce them to do business together upon terms that may be justly objectionable or injurious.' It will hardly be insisted that a different rule applies in respect to through freight traffic, and joint through rates or charges, the arrangements for which, as well as the forms of the bills of lading, and the apportionment to be made of such joint tariff rates, and of losses or damage to freights in course of transit, are all matters of private agreement. Such arrangements, which usually include the reciprocal interchange of cars and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex, as shown in the above statement of facts. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases and with other connecting lines, they might be prejudicial and injurious to the interest of one or both. Can companies in the latter situation properly claim, as matter of right, what the former have acquired under and by virtue of private contract and arrangement? No provision of law rightly construed sanctions or supports such a proposition. The statute does not undertake to create between connecting lines such an agency or *quasi* partnership relation as is necessarily involved in agreements or arrangements for the establishment of through routes and the making of through rates. As such arrangements exist by contract, expressed or implied, the fact that a common carrier enters into them, with one or more connecting lines, does not impose upon such carrier the duty or obligation to make the same or like contracts with all other lines."

The case at bar is not distinguishable from the case of the Little Rock and Memphis R. R. Co. vs. Iron Mountain and Southern R. R. Co. and The Hot Springs Railroad Company, 41 Fed. Rep., 559. In that case the complaint against this defendant by the same plaintiff was that arrangements would not be made by which a through route for passengers could be created, composed of the following lines of railway: the Hot Springs and Malvern road, from Hot Springs to Malvern, in the State of Arkansas; the St. Louis, Iron Mountain and Southern, from Malvern to Little Rock, and the Memphis and Little Rock, from Little Rock to Memphis, and from Memphis to points east over other lines; the complaint being that the St. Louis, Iron Mountain and Southern did unite with the Hot Springs and Malvern road in a through route composed of the Hot Springs and Malvern, the St. Louis, Iron Mountain and Southern, from Malvern to Bald Knob and Memphis, and then from Memphis eastward over the connecting lines. The bill of complaint in that case was a counterpart of the bill of complaint in this case, and sought a mandatory injunction compelling the Hot Springs R. R. Co. to sell tickets over the road of the complainant upon the same terms and conditions as it did over the road of the St. Louis, Iron Mountain and Southern. The defense was that the complainant had no special contract or agreement for through rates with the St. Louis, Iron Mountain and Southern, and that its line of railway would necessarily form an essential part of such through route. The case came before CALDWELL, Circuit Judge, and upon this question he said, page 562:

"It is apparent from the affidavits and from common knowledge that to effect through routeing and through

rates over independent lines of railroads, contract relations must be established between the companies operating the roads. The share which each road is to receive of the through rate, the mileage rate to be paid or allowed on cars passing over each others lines, the method of adjusting losses, the arrangement of time-tables, the rates for passengers and freights, and other matters are necessarily matters of contract; the solvency of the respective lines, their ability to handle in a satisfactory manner the joint traffic, and their ability to contribute to that traffic, and various other considerations enter into and influence the terms of such contracts. The common law imposes no obligation on railroads to enter into such contracts. 'At common law a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may in the absence of statutory regulations to the contrary determine what agencies he will employ' (Atchison, T. & S. F. R. Co. vs. Denver & N. O. R. Co., 110 U. S., 667-680; 4 Sup. Ct. Rep., 185). Making contracts for parties "is not within the scope of judicial power" (Express Cases, 117 U. S., 1-26). In the case last cited, the court, speaking of the decree of the court below fixing and regulating the terms upon which the railroad company and the express company should do business, said:

"'In this way, as it seems to us, the court has made 'an arrangement for the business intercourse of these 'companies, such as, in its opinion, they ought to have 'made for themselves,' and that we said in Atchison, T. & 'S. F. R. Co. vs. Denver & N. O. R. Co., 110 U. S., 667; '4 Sup. Ct. Rep., 185, followed at this term in Pullman's 'Palace Car Co. vs. Missouri Pac. Ry. Co., 115 U. S., '587; 6 Sup. Ct. Rep., 194, could not be done. The 'regulation of matters of this kind is legislative in its 'character, not judicial. To what extent it must come, 'if it comes at all, from Congress, and to what extent it 'may come from the States, are questions which we do 'not now undertake to decide; but that it must come, 'when it does come, from some source of legislative 'power, we do not doubt' (117 U. S., 29; 6 Sup. Ct. Rep., 556).

"See to the same effect, Kentucky & I. Bridge Co. vs. Louisville & N. R. Co., 2 Int. St. Com. R., 351; 37 Fed. Rep., 567.

"Has the jurisdiction been conferred by the act of Congress? Complainant maintains that it has by the

third section of the interstate commerce act. It would serve no useful purpose for the court to engage in an extended discussion of this question. It has been discussed and decided by the Interstate Commerce Commission in Little Rock & M. R. Co. vs. East Tennessee, V. & G. R. Co., 3 Int. St. Com. R., 1. In that case the present plaintiff was seeking the same relief that it seeks in this case, and its petition was dismissed, on the distinct ground that the act of Congress does not, as does the present English statute, invest the commission or the courts with the power to compel companies to enter into through routing and through rate contracts. The case of Chicago & A. R. Co. vs. Pennsylvania R. Co., 1 Int. St. Com. R., 9, *Id.*, 360, and the opinion of Judge JACKSON in Kentucky & I. Bridge Co. vs. Louisville & N. R. Co., 2 Int. St. Com. R., 351, 37 Fed. Rep. 567, are to the same effect. I am satisfied to rest the decision of the question on the reasoning of the opinions in the cases cited, which, to my mind, cannot be satisfactorily answered."

The case just cited covers the case at bar. The two cases are precisely the same in principle, and not essentially different in their facts. The attempt of the plaintiff in his brief (p. 11) to distinguish the same clearly fails.

These cases were followed in 1892 by a case involving the same question brought by the Oregon Short line and Utah Northern Railway Company against the Northern Pacific Railway Company, in which the proper construction of section 3 of the interstate commerce act was carefully considered by Justice FIELD. The case was very thoroughly argued, as stated by the judge in his opinion, and his conclusions may be summed up very briefly by quoting the third and fourth points of the syllabus, as the case is reported in 51 Fed. Rep., 465:

3. In the absence of any arrangement between connecting railway companies, there is no obligation on

the part of either to honor passenger tickets issued by the other.

4. Section 3 of the Interstate Commerce Act (24 St., p. 380, making it unlawful for any common carrier subject to the provisions of the act to give any "undue or unreasonable preference" to any person, company, &c., or locality or particular description of traffic, and providing that such carriers shall "afford "all reasonable, proper and equal facilities for the in- "terchange of traffic between their respective lines, "and for receiving, forwarding and delivering passen- "gers and property to and from their several lines and "those connecting therewith, and shall not discrim- "inate in their rates and charges between such con- "necting lines; but this shall not be construed as "requiring any such common carrier to give the use of "its tracks or terminal facilities to another carrier en- "gaged in like business," does not require a railroad company to receive freight in the cars in which it is tendered by a connecting line, and transport it in such cars, paying car mileage therefor, when it has cars of its own available, and the freight would not be injured by the transfer.

Justice FIELD, upon the question which is at issue in this case, at page 472, says:

"As to the alleged obligation of the defendant to honor tickets or coupons for passage over its lines north of Portland issued by the complainant, it is sufficient to say there is no evidence in support of it. The practice of railway companies operating connecting lines to honor tickets or coupons for passage over their respective lines issued by a connecting company, which is very general, is founded entirely upon arrangements between the connecting companies. In the absence of such arrangements there is no obligation on the part of either company to honor tickets issued by the other."

In January, 1894, the same question was before the Circuit Court for the Eastern District of Arkansas, with the Little Rock and Memphis Railroad Company as complainant, and the St. Louis, Iron Mountain and Southern Railway Company and others as de-

fendants. The ground of the alleged discrimination in that case was the refusal on the part of the defendants to permit through billing and routeing over the line of the St. Louis, Iron Mountain and Southern when such through billing and routeing was permitted to other forwarding roads. In this case the element was present that the complainant possessed the same necessary tracks and terminal facilities which were possessed by the companies favored with arrangements for through billing and routing, and it therefore insisted that under the third section of the interstate commerce act such arrangements should be conceded to it. The cases were heard upon demurrers to the bills, and decision was by WILLIAMS, District Judge, and was adverse to the contention of the complainant in that case, holding that although the complainant possessed the necessary tracks and terminal facilities, the defendant might still insist on carrying all freight offered by such road in its own cars, and might require reloading and rebilling at the local rates, and also that it might require as a condition of the carriage of the freight a prepayment of the charges upon such freight, although it did not require a reloading or rebilling or repayment of the charges upon freight offered by other forwarding roads. The decision considers carefully the various decisions which have been made, and is a full and thorough discussion of the proper interpretation of the third section of the interstate commerce act, and accords fully with the interpretationwhich we insist should be given thereto. This case was carried on appeal to the Circuit Court of Appeals for the Eighth Circuit, and in September, 1894, decision was rendered in the case (63 Fed. Rep., 875) affirming the conclusion

reached by Judge WILLIAMS. THAYER, Circuit Judge, rendered the opinion of the Circuit Court of Appeals, in which CALDWELL and SANBORN, JJ., concurred. THAYER, C. J., says (p. 781):

"Furthermore, it is the settled construction of the act, as we have before remarked, that it does not make it obligatory upon connecting carriers to enter into traffic arrangements for through billing and rating, as to passenger or freight traffic. This conclusion has been reached by all of the tribunals who have had occasion to consider the subject, and it is based on the fact that in enacting the commerce act congress did not see fit to adopt that provision of the English railway and canal traffic act, passed in 1873, which expressly empowered the English commissioners to compel connecting carriers to put in force arrangements for through billing and through rating when they deemed it to the interest of the public that such arrangements should be made (Little Rock & M. R. Co. vs. East Tennessee, V. & G. R. Co., 3 Interst. Commerce Com. R., 1, 9, 10; Kentucky & I. Bridge Co. vs. Louisville & N. R. Co., 37 Fed Rep., 567, 630, 631. See also the second annual report of the interstate commerce commission (2 Interst. Commerce R., 510, 511). In the light of these adjudications we are compelled to conclude that if the charge of an unreasonable discrimination cannot be successfully predicated on the ground that a railway company makes an arrangement with one connecting carrier for the use of its tracks and terminals, which it refuses to make with another, although the physical facilities for an interchange of traffic are the same, then the charge of discrimina ion cannot be predicated on the ground that it makes an arrangement for through billing and rating with one carrier and does not make it with another. The interstate commerce act does not, it seems, at present, make it obligatory on carriers to make arrangements of either sort, and does not give the commission power to compel such arrangements, but leaves connecting carriers, as at common law, to determine for themselves when such arrangements are desirable and when undesirable. Moreover, arrangements for through billing and rating will, as a general rule, necessarily involve an agreement for the use, to some extent, of each others terminals and tracks; and,

by the express language of the statute, such use cannot be enforced without the consent of the owner. We are unwilling, therefore, as the law now stands, to compel the defendant companies to afford the facilities which the complainant demands. As was said by Mr. Justice JACKSON, then circuit judge, in the case to which we have already referred :

" The law should be as liberally construed in favor of commerce among the states as its language will permit ; but, when complaint is made or relief is sought solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the act complained of or the right asserted should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred."

The opinion in this case is so well considered and so thorough that we might well rest our case upon it without further elaboration. But there are other decisions to the same effect.

The proper construction of section 3 is also considered in the case of the Chicago and Northwestern Railway Company vs. Osborne (10 U. S. Appeals, 431). Justice BREWER, delivering the opinion in that case, says, page 438 :

" A joint tariff does not bind road to road in the sense that the two are used, or by either corporation. There is neither unity of ownership nor unity of operation, but only a singleness of charge and a unity of transportation over the connecting roads. Neither is there any mandate to connecting roads to surrender any control of their own roads or to unite in a joint tariff. ' Reasonable, proper and equal facilities for the ' interchange of traffic ' are commanded by the third section, but with the proviso ; ' this shall not be con- ' strued as requiring any such common carrier to give ' the use of its tracks or terminal facilities to another ' carrier engaged in the like business,' and no power existed at common law and none is given by the act to court or commission to compel connecting companies to contract with each other to obtain full control of their separate roads, or to unite in a joint tariff (Express

Cases, 117 U. S., 1; Kentucky & I. Bridge Co. vs. Louisville & N. R. Co., 37 Fed. Rep., 567; Little Rock & M. R. Co. vs. St. L., I. M. & S. R. Co., 411 Fed. Rep., 559). The whole matter is left to the voluntary action of the companies, and, in forming by agreement of any joint tariff the basis of division and the proportion of money that each shall take, is also a matter left to their determination."

That the construction contended for by the complainant would make Section 3 unconstitutional as being an unjustifiable invasion of property rights (see Atty. Genl. vs. Old Colony R'd Co., 160 Mass., 62). We invite the attention of this Court to the thorough discussion of the subject in that case.

If, however, the court should be of opinion that the construction contended for by the complainant should prevail, still it would not follow that the relief demanded by the complainant should be granted; the question will still arise as to whether or not that which is demanded by the complainant in this case is something that may be required of the defendants in view of the situation of these railroads with respect to each other. At Memphis, the East Tennessee, Virginia and Georgia Railway connects with the complainant's line of road, and also with the Iron Mountain Railway. The complainant's line of road terminates at Little Rock; the connecting line at Memphis, or the Bald Knob Branch, connects with the main line of the Iron Mountain at Bald Knob, and the main line then leads northward to St. Louis and southward to Texarcana. *There is no question of discrimination or undue preference in the sale of tickets to any point which is reached by the complainant's road.* The assignment of errors very clearly indicates that the complaint is respecting the sale of tickets to points

beyond Little Rock upon the line of the Iron Mountain Road over the Bald Knob Branch, and the main line of the Iron Mountain, and the refusal to sell such tickets over the complainant's road, completing the line by such portion of the Iron Mountain's main line as would be necessary to reach the point of destination (Record, p. 17). The question is therefore a very narrow one under the bill in the case and under the assignment of errors. It is whether there is anything illlegal and discriminating in the Iron Mountain and East Tennessee, Virginia and Georgia Railway Company's forming a through connection for points reached by their respective lines of railway, *and not reached by the complainant's line of railway*, and selling each for the other through tickets from such points good over each other's lines—in other words, whether or not the Iron Mountain Railway Company, having constructed its Bald Knob Branch to Memphis for the purpose of reaching a connection with that centre of traffic, and thereby opening for such traffic all points upon its main line of railway between St. Louis and Texarcana, and having expended its money therefor, is guilty of discrimination because it refuses to incorporate the complainant's line from Little Rock to Memphis with its main line as a part of a similar through line of railway, and maintaining the same in competition with its branch line which it has built from Bald Knob to Memphis. The mere statement of the proposition would seem to carry its own refutation with it. It is preposterous to suggest that there is anything illegal in such an arrangement between these parties contemplating points not reached by complainant's road.

To adopt the principle contended for by the plaintiff would revolutionize existing railway operation and

management, and it is impossible to foresee its disastrous effects. It would tend to break up and destroy all arrangements for through rates and business.

It is to be noted that no complaint is made as to any point reached by the complainant's road, but the complaint is solely as to points reached by the roads of the defendants, through which, and to which the complainant has no constructed line. In other words, it demands in substance that it shall have the benefit of the construction which the defendants have made of their lines, and that, contrary to the provisions of section 3 of the interstate commerce act, it shall be given the use of the tracks or terminal facilities, whereas the act provides that the section "shall not be "construed as requiring any such common carrier to "give the use of its tracks or terminal facilities to "another carrier engaged in like business."

II.

The action of the court was right, for the reason that the only remedy for the enforcement of the right claimed by the complainant, if it existed, is not by bill in equity, but by proceeding in mandamus or by suit for damages.

The very meager character of the bill in this case is worthy of attention in this connection. After averring in the first paragraph of the bill the existence and location of the lines of railway of the complainant and of the two defendants, we have the averment that in

May, 1888, the St. Louis, Iron Mountain and Southern Railway Company opened a branch from Balb Knob in the State of Arkansas to Memphis in the State of Tennessee running parallel with your orator's line and built with the express purpose of competing with it. It is fifteen miles longer than your orator's line and its facilities for accommodating through passenger traffic at Memphis are much inferior than those of your orator's. To reach its depot in Memphis from that of the East Tennessee, Virginia and Georgia Railroad a transfer of about two miles in an omnibus over rough streets is necessary, while to your orator's track passengers can be transferred in the cars in which they arrive. For these reasons notwithstanding the opening of the Bald Knob branch, the traffic of your orator remained substantially the same, the traveling public preferring it to its adversary. For the purpose of breaking down the legitimately acquired business of your orator and crushing a rival the St. Louis, Iron Mountain and Southern Railway Company has directed all railroads connecting at Memphis to call in all through tickets reading over the Little Rock and Memphis Railroad and thence over the St. Louis, Iron Mountain and Southern Railway, leaving on sale only the through tickets over the Bald Knob branch ; and the East Tennessee, Virginia and Georgia Railroad Company has signified its assent to this direction, and has, since July 1, 1888, actually withdrawn the tickets over your orator's line in connection with the St. Louis, Iron Mountain and Southern Railway, but still continues to sell tickets over the Bald Knob branch and the St. Louis, Iron Mountain and Southern Railway, all of which is in direct contravention of the provisions of the Act of Congress entitled "An Act to regulate commerce," ap-

proved February 4th, 1887. The orator, therefore, prays for process of subpœna against said defendants, requiring them named in the caption and for a mandatory injunction against said defendants requiring them to afford your orator the same equal facilities as are afforded to any other connecting road, and for such other relief as may be deemed equitable.

The interstate commerce act does not undertake, except by section 16, to provide for any special method of enforcement of violations of the act save and except that by section 8 there is the declaration that any common carrier doing anything declared to be unlawful by the act shall be liable for the full amount of damages sustained in consequence of such violation. Section 9 provides that any person claiming damages may either make complaint to the Commission or may bring suit for recovery of the damages in any district or circuit court of the United States of competent jurisdiction. Section 10 provides for penalties for the violation of the act by a common carrier or its officers and methods by which these penalties shall be enforced. Sections 11 and 12 and 13 provide for investigation and appointment of commission, the investigation of complaints by the commission and methods of examination; and sections 14 and 15 provide for investigation of complaints by the Commission and the making and service of report thereon; by section 16 there is provision for an application upon any order or requirement to the Circuit Court of the United States sitting in equity for the enforcement of such order of the commission. In all other respects than as provided in section 16 the fundamental distinction between a suit in equity and a suit at law is left unaffected by the act, and the question of whether

or not the procedure is a proper procedure in equity is dependent upon the nature of the case made by the bill. The question, therefore, whether that which the defendants are asserted to have done in this case, presents a case cognizable in equity, is one that is to be determined by the general principles of equity jurisprudence. What is averred is simply that the St. Louis, Iron Mountain and Southern has called in all through tickets reading over the Little Rock and Memphis road, and then over the St. Louis, Iron Mountain and Southern; that the East, Tennessee, Virginia and Georgia has signified its assent to this direction, and has withdrawn the tickets over the complainant's line, but still continues to sell tickets over the Bald Knob branch of the St. Louis, Iron Mountain and Southern, all of which is in direct contravention of the provisions of the act of Congress, meaning thereby section 3 of the act in question.

The contention of the brief, and the only contention which is possible under these facts, must be that, upon the language of section 3, the thing done by these defendants is a clear violation of an obligation imposed by section 3 of the act. If, however, such is the clear meaning of section 3, and it does impose such a duty upon these defendants as is claimed on behalf of the complainant, then, if the thing done—the violation of the right created by the act—is one which can be compensated in damages, clearly no right exists to an injunction, and to a bill in equity to maintain it. Upon this question the bill is silent, and it is essential, to maintain the bill in equity, that it should appear upon its face, by clear allegation, that there is no adequate remedy at law. This does not appear. **It is further to be be observed that the**

remedy by bill in equity is not the proper remedy to enforce the performance, by a corporation, of public duties prescribed by law. It is not a subject matter cognizable in a court of equity, and never has been treated as such, for the reason that there are adequate remedies at law. The leading case upon this subject, in which Chancellor KENT considered this question (Attorney-General vs. Utica Insurance Co., 2 Johnson's Chancery, 371), is precisely in point upon the general rule upon this subject. The head note expresses very clearly Chancellor KENT's general view upon the subject, and we here quote it, together with a few extracts from the opinion :

" This Court has no jurisdiction over offenses against a public statute, or to restrain persons from carrying on the business of banking, in violation of the act passed the 6th of April, 1813, to restrain unincorporated banking associations ; and a motion made by the Attorney-General, on an information filed by him *ex officio*, for an injunction for that purpose, was refused."

The case is stated in the first paragraph of the opinion :

" An information is filed by the Attorney-General, *ex officio*, against the defendant, charging it with engaging in banking operations without any authority under the act incorporating it, and in violation of the prohibition in the act to restrain unincorporated banking associations. The information concludes not only with the usual prayer for process for subpœna, but for an injunction to restrain the company from business incident to incorporated banks. * * *

" The charge contained in the information savors, then, so much of a criminal offense that it would require a clear and settled practice to justify the interference of this Court, when that interference is not called for in aid of a prosecution at law. The charge

of the usurpation of a franchise has so frequently occured, and the remedy by injunction is so convenient and summary that the jurisdiction of this Court would have been placed beyond all possibility of doubt and have been distinctly announced by a series of precedents if any such general jurisdiction existed. But I have searched in vain for this authentic evidence of such a power. The precedents are all in the Court of K. B., and Kyd cites nearly a hundred instances within the last century of informations filed in the K. B. to call in question the exercise of a franchise. * * *

"If a charge be of a criminal nature or an offense against the public and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this Court, which was intended to deal only in matters of civil right, resting in equity, or where the remedy at law was not sufficiently adequate. * * *

"The plain state of the case, then, is that an information is here filed by the Attorney-General to redress and restrain by injunction the usurpation of a franchise, which, if true, amounts to a breach of law and of public policy. I may venture to say that such a prosecution is without precedent in this court, but it is supported by a thousand precedents in the courts of law. How, then, can I hesitate on the question of jurisdiction?

"The whole question upon the merits is one of law and not of equity. The charge is too much in the nature of a misdemeanor to belong to this court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this without the clearest sanction. I shall better consult the stability and utility of the powers of this Court by not stretching them beyond the limits prescribed by the precedents. Without, therefore, giving any opinion on the question whether the Utica Insurance Company are entitled to exercise banking powers, I am of opinion that I have no jurisdiction in the case before me, and that the motion for the injunction must be denied."

The distinction between a cause properly cognizable in a court of equity and one which is enforceable by mandamus in a court of law is very clearly presented in the case of Smith vs. Bourbon County, 127 U. S., 105. This

was an action by a judgment creditor of a Railway Company upon whose judgment against the Railway Company an execution had been issued and returned unsatisfied, the corporation being insolvent. The bill was filed to subject to the satisfaction of the judgment an alleged indebtedness of Bourbon County, Kansas, to the judgment debtor. This indebtedness consisted of a supposed legal obligation on the part of the Commissioners of Bourbon County to deliver to the Railway Company municipal bonds of the county in payment of a subscription to stock in the sum of $150,000. The prayer of the bill was, first, for a decree ordering the Railway Company to assign to the complainant its claim against the County of Bourbon; second, for a decree against Bourbon County, ordering the latter to sign and issue in due form the bonds of said county in the sum of $150,000, according to the terms of the subscription. This Court was of the opinion that the action was not maintainable; that the obligation on the part of the Commissioners of the county was only enforceable by a proceeding at law in the name of the Railway Company by a writ of mandamus; that the sole extent to which he could be entitled to a decree in equity against the Railway Company was for an assignment of its claim, and that he could not join with it, although this claim was an equitable one, the cause of action for the enforcement of a legal remedy against the county. Justice MATTHEWS, passing on the question, says:

"It is clear that such relief as is alone suitable and adequate to the case cannot be granted in equity. If the proceedings were in the name and on behalf of the Railroad Company itself, it would, as we have already stated, be at law in mandamus. That the complainant

claims to be equitably entitled to be substituted for the Railroad Company in its rights against Bourbon County may entitle him to a decree against the Railroad Company for an assignment of its claim, so as to confer upon the complainant the right to use the name of the Railroad Company in a proceeding against the county and its Commissioners; but it does not enlarge the rights of the Railroad Company against the county and its officers, nor change the remedy so as to enable a court of equity to entertain proceedings in mandamus. The bill might justify a decree against the Railroad Company for an assignment of its right to the bonds, and requiring the Railroad Company to permit the use of its name for their recovery by the appropriate proceeding at law. The right to proceed against the county and its Commissioners remains still a purely legal right, and can only be prosecuted at law, notwithstanding the equitable nature of the complainant's rights against the Railroad Company."

See, also,

Scott vs. Neeley, 140 U. S., 106.

Buzzard vs. Houston, 119 U. S., 374.

2 Pomeroy's Equity (2d Ed.), sections 944 *et seq.*, and sections 296, 1415.

United States vs. Ingate, 48 Fed. Rep., 251.

N. Y. Guaranty Co. vs. Memphis Water Co., 107 U. S., 105.

Osborne vs. Mo. Pac. Ry. Co., 147 U. S., 248.

Sheffield Furnace Co. vs. Witherow, 149 U. S., 574.

Hollins vs. Coal & Iron Co., 150 U. S., 371.

See, also, case of People vs. Same *(quo warranto)*, 15 Johns., 358, S. P.; Comwlth. vs. Bank, 28 Pa., 389 *(quo warranto)*; *Id.* (same matter of equity), p. 379.

The Supreme Court of the United States has always maintained the distinction between mandamus and relief in equity. Their respective functions are distinct. Thus, mandamus and not a bill in equity lies to compel

municipalities to levy taxes according to their contract duty.

Walkley vs. Muscatine, 19 Wall., 167.
Heine vs. Levee Commrs., 19 Wall., 655.
Barkley vs. Levee Commrs., 93 U. S., 258.
Thompson vs. Allen County, 115 U. S., 550.
Rosenbaum vs. Bauer, 120 U. S., 450.
Smith vs. Bourbon County, 127 U. S., 105.
Butterworth vs. United States, 112 U. S., 50.

Remedy to compel performance of public duty by corporations is by mandamus and not in equity. The principle is elementary. It is indeed fundamental in federal jurisprudence. To those who recall the nature and extent of the superintending jurisdiction of the Queen's Bench over all public bodies and corporations, exercised largely by mandamus, and in connection with this the historical development of equity as a supplement to and aid to law where the legal remedies were inadequate, the principle is extemely clear.

Re Sawyer, 124 U. S., 200, where the general subject was fully considered.
Hannewinkle vs. Georgetown, 15 Wall., 547.
Dows vs. Chicago, 11 Wall., 108.
Many cases, Federal and State, are cited in Dillon, Munic. Corp. (4th Ed.), Secs. 826, 906–908.

In the *Federal Courts*, by express Act of Congress, there can be no case of equitable cognizance where there is a plain and adequate remedy at law (see cases last cited, and also Ewing vs. St. Louis, 5 Wall., 413).

The said Act of Congress provides that "suits in equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

Why is not the remedy by mandamus adequate and complete? They are public duties *simpliciter* and strictly. They do not relate to property or private property rights, and therefore are not within the class of subjects to which the jurisdiction of equity extends, for, in the language of Mr. Justice GRAY (*Re* Sawyer, 124 U. S., *p.* 210), "the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."

III.

The action of the Circuit Court in sustaining the demurrer to the bill was right, and its action in dismissing the bill should be affirmed.

JOHN F. DILLON,
WINSLOW S. PIERCE,
RUSH TAGGART,
Of Counsel for St. Louis, Iron Mountain and Southern Ry. Co.

56 United States District Court for the Southern District of New York.

THE UNITED STATES, Libellant,
against
THE STEAMSHIP "BAYONNE," JOHN EDWARD PAYNE, Claimant.

The above-named claimant, John Edward Payne, considering himself aggrieved by the final decree entered in this cause on the 21st day of December, 1892, hereby appeals from said decree to the United States Supreme Court upon the ground that this court was without jurisdiction to make the said decree; and thereupon he prays that his said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree was made may be sent up, duly authenticated, to the United States Supreme Court.

CONVERS & KIRLIN,
Proctors for Claimant, 5 Beekman Street, New York.

Appeal allowed.

ADDISON BROWN, *U. S. D. J.*

(Endorsed: Order allowing appeal. Filed Dec. 31, 1892.)

57 At a term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 31st day of December, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Addison Brown, district judge.

THE UNITED STATES
vs.
THE STEAMSHIP "BAYONNE," JOHN EDWARD PAYNE, Claimant.

It appearing from the records in this case that a stipulation for value in the sum of three thousand dollars, with sureties, and approved by the proctor for the libellant, is on file, and that the decree against which the claimant has appealed is for the sum of three hundred and twenty-seven $\frac{87}{100}$ dollars—

It is ordered, on motion of the appellant, that no further bond on appeal is required, the libellant, however, to have leave to re-examine the sureties on the present stipulation if desired, and if they are found to be unsatisfactory the appellant shall furnish such other sureties thereon as a further order of the court may require.

ADDISON BROWN, *U. S. D. J.*

58 UNITED STATES OF AMERICA, *ss:*

By the Honorable Addison Brown, United States district judge for the southern district of New York, to the United States of America and Edward Mitchell, United States attorney for the southern district of New York, Greeting:

Whereas John Edward Payne, claimant of the steamship "Bayonne," has appealed to the Supreme Court of the United States from a decree rendered in the district court of the United States for the southern district of New York, made in your favor against the steamship "Bayonne," John Edward Payne, claimant, and has filed an assignment of errors and obtained a supersedeas, as required by law, you are therefore hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the 15th day of February, 1893, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, on the 17th day of January, 1893.

ADDISON BROWN,
U. S. Dist. Judge.

CONVERS & KIRLIN,
Proctors for Appellant.

(Endorsed: Citation. Filed Jan'y 17, 1893.)

59 United States District Court, Southern District of New York.

THE UNITED STATES, Libellant & Appellee,
against
THE STEAMSHIP "BAYONNE," JOHN EDWARD PAYNE, Claimant & Appellant.

Assignment of Errors.

The learned court below erred in taking jurisdiction of the cause and entering a decree against the steamship "Bayonne" in the following particulars:

First. Because the act in question creates no lien enforce-able *in rem* except as against a boat or vessel used or employed in violating some provision of the act, whereas the "Bayonne" was not used or employed in violating any provision of the act.

Second. Because the act does not create a lien enforce-able against the "Bayonne" *in rem* to recover the penalties to which the person or persons who committed the offense complained of may have been subject under section one of the act.

Third. Because if the act does create a liability on the
60 part of the "Bayonne" for the pecuniary penalty to which the person or persons who committed the offense may be subject under section one of the act, such penalty is not recoverable against the "Bayonne" *in rem* without a previous imposition of the fine upon the offender or offenders.

Fourth. Because the limits within which the deposit of refuse matter was intended to be prohibited have never been drawn by the supervisor of the harbor in accordance with the requirements and specifications of the act or in accordance with law, and therefore the deposit of ashes at the place they were deposited by a person or persons from the deck of the "Bayonne" did not constitute an offense for which the "Bayonne" can be held responsible under the provisions of the act.

CONVERS & KIRLIN,
Proctors for Claimant and Appellant.

Let the within be filed *nunc pro tunc* as of Dec. 31st, 1892.
ADDISON BROWN, *U. S. D. J.*

(Endorsed: Assignment of errors. Filed Jan'y 17, 1893, as of Dec. 31, 1892.)

61 Supreme Court of the United States.

THE UNITED STATES, Libellant and Appellee,
against
THE STEAMSHIP "BAYONNE," ETC.; JOHN EDWARD PAYNE, Claimant and Appellant.
} Joinder in Error

And afterwards, to wit, on the 15th day of February, 1893, The United States of America, libellant and appellee, by its proctor, Edward Mitchell, United States attorney for the southern district of New York, comes here into court and says there is no error either in the record of proceedings aforesaid or in rendering the decree aforesaid.

And he prays that the said supreme court before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the decree aforesaid, in form aforesaid granted and rendered, may be in all things affirmed.

EDW'D MITCHELL,
United States Attorney and Proctor for Libellant and Appellee.

(Endorsed: Joinder in error. Filed Jan'y 26, 1893.)

62 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

THE UNITED STATES OF AMERICA, Libellant & Appellee,
vs.
THE STEAMSHIP "BAYONNE," HER ENGINES, &C.; JOHN EDWARD PAYNE, Claimant & Appellant.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 13th day of February, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the said United States the one hundred and seventeenth.

[Seal District Court of the United States, Southern District of N. Y.]

SAM'L H. LYMAN, *Clerk.*

[Endorsed:] District court of the United States for the southern district of New York. The United States of America, lib'l't & appellee, *vs.* The Steamship "Bayonne," her engines, &c.; John Edward Payne, claimant & appellant. Cert'd copy record.

Endorsed on cover: Case No. 15,263. S. New York, D. C. U. S. Term No., 215. The Steamship "Bayonne," her engines, &c., John Edward Payne, claimant, appellant, *vs.* The United States. Filed February 20, 1893.